STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For the Years
1967 through 1972

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ATTORNEYS GENERAL OF MAINE

1820 – 1966

Erastus Foote, Wiscasset 1820
Jonathan P. Rogers, Bangor 1832
Nathan Clifford, Newfield 1834
Daniel Goodenow, Alfred 1838
Stephen Emery, Paris 1839
Daniel Goodenow, Alfred 1841
Otis L. Bridges, Calais 1842
W. B. S. Moor, Waterville 1844
Samuel H. Blake, Bangor 1848
Henry Tallman, Bath 1849
George Evans, Portland 1853
John S. Abbott, Norridgewock 1855
George Evans, Portland 1856
Nathan D. Appleton, Alfred 1857
George W. Ingersoll, Bangor (died in office) 1860
Josiah H. Drummond, Portland 1860
John A. Peters, Bangor 1864
William P. Frye, Lewiston 1867
Thomas B. Reed, Portland 1870
Harris M. Plaisted, Bangor 1873
Lucilius A. Emery, Ellsworth 1876
William H. McLellan, Belfast 1879
Henry B. Cleaves, Portland 1880
Orville D. Baker, Augusta 1885
Charles E. Littlefield, Rockland 1889
Frederick A. Powers, Houlton 1893
William T. Haines, Waterville 1897
George M. Seiders, Portland 1901
Hannibal E. Hamlin, Ellsworth 1905
Warren C. Philbrook, Waterville 1909
Cyrus R. Tupper, Boothbay Harbor (resigned) 1911
William R. Pattangall, Waterville 1911
Scott Wilson, Portland 1913
William R. Pattangall, Augusta 1915
Guy H. Sturgis, Portland 1917
Ransford W. Shaw, Houlton 1921
Raymond Fellows, Bangor 1925
Clement F. Robinson, Portland 1929
Clyde R. Chapman, Belfast 1933
Franz U. Burkett, Portland 1937
Frank I. Cowan, Portland 1941
Ralph W. Farris, Augusta 1945
Alexander A. LaFleur, Portland 1951
Frank F. Harding, Rockland 1955
Frank E. Hancock, Cape Neddick 1959
Richard J. Dubord, Waterville 1965
James S. Erwin, York 1967

DEPUTY ATTORNEYS GENERAL

Fred F. Lawrence, Skowhegan 1919-1921
William H. Fisher, Augusta 1921-1924
Clement F. Robinson, Portland 1924-1925
Sanford L. Fogg, Augusta (Retired, 1942) 1925-1942
John S. S. Fessenden, Portland (Navy) 1942
Frank A. Farrington, Augusta 1942-1943
John G. Marshall, Auburn 1943
Abraham Breitbard, Portland 1943-1949
John S. S. Fessenden, Winthrop 1949-1952
James Glynn Frost, Gardiner 1952-1961
George C. West, Augusta 1961-

ASSISTANT ATTORNEYS GENERAL

Warren C. Philbrook, Waterville 1905-1909
Charles P. Barnes, Norway 1909-1911
Cyrus R. Tupper, Boothbay Harbor 1911-1913
Harold Murchie, Calais 1913-1914
Roscoe T. Holt, Portland 1914-1915
Oscar H. Dunbar, Jonesport 1915-1917
Franklin Fisher, Lewiston 1917-1921
William H. Fisher, Augusta 1921
Philip D. Stubbs, Strong 1921-1946
*Herbert E. Foster, Winthrop 1925
LeRoy R. Folsom, Norridgewock 1929-1946
Richard Small, Portland 1929-1935
Frank J. Small, Augusta 1934-1946
Ralph W. Farris, Augusta 1935-1940
William W. Gallagher, Norway 1935-1942
Richard H. Armstrong, Biddeford 1936
*David O. Rodick, Bar Harbor 1938-1939
*Ralph M. Ingalls, Portland 1938-1940
John S. S. Fessenden, Portland (Navy) 1938-1942
Carl F. Fellows, Augusta 1939-1949
*Frank A. Tirrell, Rockland 1940
Alexander A. LaFleur, Portland (Army) 1941-1942
Harry M. Putnam, Portland (Army) 1941-1942
Julius Gottlieb, Lewiston 1941-1942
Neal A. Donahue, Auburn 1942-1962
Nunzi F. Napolitano, Portland 1942-1951
William H. Niehoff, Waterville 1940-1946
*1 Richard S. Chapman, Portland 1942
*1 Albert Knudsen, Portland 1942
*1 Harold D. Carroll, Biddeford 1942
Samuel H. Slosberg, Gardiner 1942-1943
John O. Rogers, Caribou 1942-1943
John G. Marshall, Auburn 1942-1943

Jean Lois Bangs, Brunswick 1943-1951
John S. S. Fessenden, Winthrop 1945-1949
Henry Heselton, Gardiner 1946-1963
Boyd L. Bailey, Bath 1946-1956
George C. West, Augusta 1947-1961
Stuart C. Burgess, Rockland 1949-1953
L. Smith Dunnack, Augusta 1949-1965
James Glynn Frost, Eastport 1951-1952
Roscoe J. Grover, Bangor 1951-1953
David E. Soule, Augusta 1951-1954
Roger A. Putnam, York 1951-1958
Miles P. Frye, Calais 1951-1954
Frank W. Davis, Old Orchard Beach 1953-1965
Milton L. Bradford, Readfield 1954-1967
Neil L. Dow, Norway 1954-1955
Orville T. Ranger, Fairfield 1955-1961
George A. Wathen, Easton 1955-1961
Ralph W. Farris, Portland 1957-1965
Richard A. Foley, Augusta 1957-1963
Frank A. Farrington, Augusta 1958-
Stanley R. Tupper, Hallowell 1959-1960
Thomas Tavenner, Freeport 1960-1962
John W. Benoit, Jr., Augusta 1961-
Ruth Crowley, Augusta 1961-
Courtland D. Perry II, Augusta 1961-
Jon R. Doyle, Winthrop 1961-1971
Wayne B. Hollingsworth, Augusta 1961-1965
Albert E. Guy, Gray 1961-1963
Leon V. Walker, Jr., Eliot 1962-
Peter G. Rich, Portland 1962-1963
Carl O. Bradford, Auburn 1963-1963
Frederick P. O'Connell, Augusta 1963-1965
Richard S. Cohen, Hallowell 1963-
Jerome S. Matus, Augusta 1964-
Emery O. Beane, Jr., Augusta 1965-1967
James M. Cohen, Lewiston 1965-1969
Ronald L. Kellam, Portland 1965-1967
Phillip M. Kilmister, Augusta 1965-1970
John B. Wlodkowski, Augusta 1965-1967
Peter T. Dawson. Augusta 1966-1968
Frederick P. O'Connell, Augusta 1967-1968
Garth K. Chandler, Waterville 1967-1971
Daniel G. Lilley, Farmingdale 1967-1969
John N. Kelley, Hallowell 1967-1969
Robert G. Fuller, Jr., Cape Porpoise 1967-1971
Warren E. Winslow, Jr., Augusta 1967-1970
Keith N. Edgerley, Dover-Foxcroft 1967-1972
Wendell R. Davidson, Hallowell 1967-1970
Harry N. Starbranch, Augusta 1967-1969

Peter T. Dawson, Hallowell 1968-1971
Janice M. Lynch, West Gardiner 1968-1972
Merrill A. Tracey, Manchester 1968
Richard W. Gerrity, Augusta 1969-1969
Clayton N. Howard, Damariscotta 1969-1971
Nicholas S. Strater, York 1969-1970
Charles R. Larouche, Augusta 1970
E. Stephen Murray, Cumberland Foreside 1970
Craig H. Nelson, Waterville 1970-1972
John M. R. Paterson, Augusta 1970
Pasquale J. Perrino, Jr., Manchester 1970
John E. Quinn, Fayette 1970
Chadbourn H. Smith, Farmingdale 1970
Peter W. Cully, Augusta 1970-1972
John M. Dudley, Augusta 1971
John Kendrick, Dresden 1971
Lee M. Schepps, Augusta 1971
Jerrold B. Speers, Winthrop 1971-1972
Vernon I. Arey, Augusta 1972
John R. Atwood, Jefferson 1972
Robert B. Calkins, Augusta 1972
Andrews B. Campbell, Augusta 1972
William J. Kelleher, Augusta 1972
Fernand R. LaRochelle, Augusta 1972
Malcolm L. Lyons, Portland 1972
Eugene W. Murray, Augusta 1972
Martin L. Wilk, Brunswick 1972
Ronald J. Cullenberg, Augusta 1972-1972

Assistants in Law Enforcement Education Section

John N. Ferdico 1970
William S. Brodrick 1972
Michael E. Barr 1972

Assistant Attorneys General Appointed Solely for the Purpose of Assisting the County Attorneys:

John O. Rogers 1972
Ronald Kellam 1972
Arthur A. Stilphen 1972
John Mitchell 1972
Roland A. Cole 1972
Gerald F. Petracelli 1972

* Temporary appointment.

*1 Limited appointment to handle cases arising under the profiteering law, without cost to the State.

COUNTY ATTORNEYS – 1967-1968

Androscoggin	William H. Clifford, Jr.
Assistant	Charles H. Abbott
Assistant	John B. Beliveau
Aroostook	Cecil H. Burleigh
Assistant	Forrest Barnes
Cumberland	Robert L. Cram
Assistant	Bennett B. Fuller, II
Assistant	Albert Guy
Assistant	Warren E. Winslow
Franklin	Hubert Ryan
Hancock	Bernard C. Staples
Kennebec	Foahd J. Saliem
Assistant	Richard Foley
Knox	Peter P. Sulides
Lincoln	Donald T. Brackett
Oxford	David F. Aldrich
Assistant	James H. Kendall
Penobscot	Albert Chick Blanchard
Assistant	Jules Mogul
Assistant	Eugene Beaulieu
Piscataquis	Judson C. Gerrish
Sagadahoc	Ronald A. Hart
Somerset	Clinton B. Townsend
Assistant	John L. Merrill
Waldo	John Wlodkowski
Washington	Garth Sprague (deceased)
	Elbridge Davis
	Gerald MacDonald
	Frederick Ward
	Alan D. Graves
York	Ronald E. Ayotte, Sr.
Assistant	Theophilus A. Fitanides

COUNTY ATTORNEYS 1969-1970

Androscoggin	William H. Clifford, Jr. Charles H. Abbott Jack O. Smith
Aroostook	Cecil H. Burleigh John O. Rogers
Cumberland	Robert T. Coffin Alexander A. MacNichol Edward W. Rogers James A. Connell
Franklin	Hubert Ryan
Hancock	Douglas B. Chapman Bernard C. Staples
Kennebec	Foahd J. Saliem Richard A. Foley
Knox	Galen P. LaGassey
Lincoln	Donald T. Brackett (deceased) Michael N. Wescott
Oxford	James H. Kendall Michael J. O'Donnell
Penobscot	Errol K. Paine William Cohen James G. Lynch (resigned) Philip Buckley
Piscataquis	John L. Easton, Jr.
Sagadahoc	Randall H. Orr
Somerset	John L. Merrill Elton A. Burky
Waldo	Stanley W. Brown, Jr.
Washington	Alan D. Graves Roland A. Cole
York	Ronald E. Ayotte, Sr. Theophilos Fitanides (resigned) Willie W. Pomerleau Edward F. Gaulin

COUNTY ATTORNEYS 1971-1972

Androscoggin	John B. Beliveau Jack O. Smith (resigned) Thomas E. Delahanty II Peter Garcia
Aroostook	Cecil H. Burleigh John O. Rogers (resigned) William J. Smith
Cumberland	Joseph E. Brennan Alexander A. MacNichol (resigned) George J. Mitchell (resigned) Donald G. Lowry David C. Pomeroy John Wuesthoff
Franklin	Jonathan R. Luce
Hancock	David W. Kee Bernard C. Staples (resigned) Samuel Nesbitt, Jr.
Kennebec	Foahd J. Saliem Donald H. Marden
Knox	Galen P. LaGassey
Lincoln	Alan C. Pease
Oxford	James H. Kendall (resigned) Michael J. O'Donnell Patrick E. Joyce
Penobscot	David M. Cox Eugene W. Beaulieu George Z. Singal
Piscataquis	John L. Easton, Jr.
Sagadahoc	Randall H. Orr
Somerset	Anthony J. Cirillo John L. Merrill
Waldo	Frank F. Romanow, Jr.
Washington	Elbridge B. Davis (resigned) John A. Mitchell (Acting County Attorney)
York	Ronald E. Ayotte, Sr. Roland A. Cole (resigned) Willie W. Pomerleau Francis P. Daughan

STATE OF MAINE

Department of the Attorney General

Augusta, Maine, December 1, 1968

To the Governor and Council of the State of Maine:

In conformity to Title 5, Section 204 of the Revised Statutes of 1964, I herewith submit a copy of the amount and kind of official business done by this department and by the several county attorneys during the preceding two years, stating the number of persons prosecuted, their alleged offenses, and the results.

JAMES S. ERWIN

Attorney General

CONSOLIDATED REPORT OF THE ATTORNEY GENERAL FOR THE YEARS 1967 – 1972, INCLUSIVE – TOGETHER WITH A STATISTICAL REPORT COVERING THE BIENNIUM 1965-1966

My predecessor, the Honorable Richard J. Dubord, did not file a report for the biennium of 1965-1966. This office prepared all the necessary statistics, but his untimely death in 1970 prevented him from preparing his own personal statement and submitting the report in the usual fashion. There is herewith transmitted the statistical reports for the biennium of 1965-1966.

Following the precedent of one of my predecessors, the Honorable Alexander A. Lafleur, and with the same interest in economy, I am presenting herewith a consolidated report covering the entire six years of my service in the biennia of 1967-68, 1969-70 and 1971-72. It should be pointed out that the statistics and all the necessary and relevant information have been ready on schedule during the past six years. The reports themselves were not issued and printed until now.

Because of the rapidly changing nature of government and the proliferation of the responsibilities of the Attorney General in the past six years, this report will be more than simply a recital of cases and opinions which have been handled in the last years. The cases and opinions do, for the most part, appear in the report, but I deem it useful and proper to preface the statistical part of the report with a narrative statement of my own, reporting the changes and the progress that have been made in the past six years in my administration and making a few recommendations for the future.

When I took office in January of 1967, the Attorney General's office had little or no internal structure. Apart from the usual assignments of one Assistant Attorney General to the Department of Mental Health and Corrections, two Assistant Attorneys General to the Bureau of Taxation, two Assistant Attorneys General to the Department of Health and Welfare and two Assistant Attorneys General to the Employment Security Commission, the rest of the office was composed of the Attorney General, one Deputy Attorney General and seven Assistant Attorneys General with an informal and vague assignment responsibility and a tradition where every lawyer in the office was the equal of every other lawyer in the office and not answerable to anyone but the Attorney General for the quality of his work or the orderly dispatch of the same. There had not been in the memory of anyone then in the Attorney General's Office a staff meeting to discuss lawyers' business among lawyers.

My predecessor, former Attorney General Richard J. Dubord, was kindness itself during the time of the transition when he left office and I took over. We had one or two very useful discussions concerning the problems of the future, and he made several recommendations about the office which I have tried to carry out and implement to some degree.

In 1967, the starting pay for a young attorney just out of law school was $6200.00 and the turnover in the office was rapid and high. In 1972, the starting pay is $9500 for young lawyers just out of law school, and although the turnover is still too rapid, the quality and personal capacities of the lawyers presently on the Attorney General's staff is extraordinarily high. There are presently two Assistant Attorneys General assigned to the Department of Mental Health and Corrections, three Assistant Attorneys General assigned to the Bureau of Taxation, two Assistant Attorneys General to the Employment Security Commission, and four Assistant Attorneys General to the Department of Health and Welfare. In addition, there are presently seven Assistant Attorneys General serving in

the general front office, and there are three Deputy Attorneys General, each with a specific assignment of command responsibility.

From the outset I requested that the Legislature make the Attorney General a full-time State office holder by law, require him to spend all of his time at his duties as Attorney General and set his salary accordingly. I'm happy to report that my successor, who takes office on the third day of January, 1973, will be the State's first full-time Attorney General, required by law to devote his full-time to the office at a salary of $23,500 which, if not as high as it ought to be, is considerably preferable to the salary of $11,000 which was the statutory pay when I took office in 1967.

The changes began to take place very rapidly from the beginning. The first thing I did was call a staff meeting of all of the lawyers who bore the title of Assistant Attorney General. From wherever they were located, they were requested to come into the front office on the second floor of the State House for an organizational meeting. Initial staff meetings were informal but informative, and we settled into a routine of staff meetings held at irregular intervals called at the request of the Attorney General or a Deputy Attorney General when it was felt that a meeting would be useful and informative to all members of the organization. Much evolved from that first staff meeting.

I discovered very early that one Assistant Attorney General was spending about half his time enforcing the water pollution laws of the State. Without any criticism of that particular individual, it was immediately obvious that this was a losing fight. Early on I assigned Assistant Attorneys General Robert G. Fuller, Jr. and Phillip M. Kilmister to the enforcement of the water pollution laws as a primary assignment. It was from this beginning that the present Environmental Protection Division of the Attorney General's Office has developed to the point where there are now three Assistant Attorneys General working almost exclusively in the field of environmental protection. As the Water Improvement Commission evolved into the Environmental Improvement Commission and now finally into the Department of Environmental Protection, it has found that there exists in the Office of the Attorney General a solid, competent and enthusiastic legal staff to advise on matters of enormous importance as Maine pioneers in the environmental protection field, and to prosecute with vigor and excellent results those individuals and institutions who are found to be in violation of Maine laws protecting the environment. This Division in the Attorney General's Department owes a great deal to former Assistant Attorney General Robert G. Fuller, Jr., whose imagination force and willingness to prosecute created the sense of mission which is shared by the present workers in that vineyard. In no small way the rapid strides which Maine has made and is making in the environmental protection field owe a great deal to the men who have participated in this significant and growing division of the Attorney General's Office. The three lawyers presently working in this area need considerably more help. This field of environmental protection cannot help but demand more and more time and attention by the State, and therefore it will require more time and attention by the Attorney General's Office in the future.

As I said earlier, the so-called general office or home office of the Attorney General's Department in 1967 was completely unstructured and had a very vague and generalized idea of its own mission. Slowly at first, but with an increasing determination that lawyers should learn to do something they neither like nor are very successful at – become administratively adept – I changed the structure and relationships in the front office. The office as it is presently structured has three Deputies. One of these is charged with the supervision of the personnel and the administration of the front office, including bookkeeping, and the general responsibility for the Assistants who are assigned and located away from the main office at the Department of Health and Welfare, the

Employment Security Commission, the Bureau of Taxation and the Department of Mental Health and Corrections. One Deputy is in charge of law enforcement and bears the responsibility for the operations of the Criminal Division, the Consumer Protection Division, the Law Enforcement Education Section and in general terms, the Alcohol Safety Action Program presently being conducted in York and Cumberland Counties by the Motor Vehicle Department. The third Deputy is charged with the responsibility for the front office Civil Division, which includes the supervision of the lawyers in the Environmental Protection Division and the five Assistant Attorneys General in the Civil Division of the front office, which handles most of the opinions written on general subjects and which now comprises a civil litigation section. Assignments presently are clear. The echelons of responsibility are known and the morale factor in this office is very high.

I come now to one of the earliest changes which were made in 1967 – the creation of the Criminal Division by statute. The exact language of that legislation reads as follows:

> *"Criminal Division* – The Attorney General is authorized to create a criminal division within the Department of the Attorney General in order to coordinate all criminal investigation and prosecution for the purpose of improving law enforcement within the State of Maine.
>
> The Attorney General shall have full responsibility for the direction and control of all investigation and prosecution of homicides and such other major crimes as the Attorney General may deem necessary for the peace and good order of the State of Maine."

Those two simple paragraphs have added a wide and significant impact in the field of the administration of criminal justice and have catapulted the Office of the Attorney General into the forefront of criminal investigation and prosecution in keeping with the common law judgment that the Attorney General is the chief law enforcement officer of the State.

In April of 1967, the Criminal Division was created, two attorneys were assigned together with one secretary and three civilian investigators.

In the years that have followed, the Criminal Division has grown steadily in size and in scope. At the present time under the supervision of Deputy Attorney General Richard Cohen employs or directly supervises 14 attorneys and 10 investigators who are involved in a variety of aspects of the field of criminal justice in Maine.

The primary responsibility of the Criminal Division, as stated in the above quoted legislation, is the coordination of all criminal investigation and prosecution for the purpose of improving law enforcement within the State of Maine. A description of the manner in which the Criminal Division carried out this responsibility in different categories of crime appears below.

Deaths

Prior to the formation of the Criminal Division, death investigations throughout the State were carried out by individual law enforcement agencies at the local, county and state level. Each agency followed its own procedures and there was no centralized coordination of either investigation or prosecution. The Criminal Division brought about a major change in this area by setting up a coordinated approach to all investigations of unexplained or unattended deaths. This was done by making the Criminal Division responsible for the investigation and prosecution of all homicides in the State with the Bureau of Criminal Investigation of the State Police acting as the investigative arm. These two groups, working together with the Chief Medical Examiner of the State, have

successfully brought the entire area of death investigation under uniform procedures for the first time.

It is worthy to note that in recent years, the Chief of the State Police has assigned seven members of the State Police Bureau of Criminal Investigation to deal exclusively with the investigation of suspicious deaths. These men have become proficient in this area and are now known as the Homicide Squad. They are presently working under the Criminal Division on all homicide cases in the State.

Over the past six years, there have been approximately 2,500 deaths brought to the attention of the Criminal Division, whether unattended, unexplained, or violent. All of these were investigated, and out of the 2,500 cases, approximately 140 resulted in Grand Jury indictments for murder or manslaughter, and were prosecuted by Criminal Division attorneys. Out of these 140, approximately 128 have resulted in convictions of murder or manslaughter. It should be noted that recently there has been a dramatic rise in the number of homicides. As of the date of this report, December 1, 1972, there have been 36 homicides in 1972.

Organized Crime

The most significant development in the area of organized crime, has been my participation in the formation and operation of NEOCIS (New England Organized Crime Intelligence System). NEOCIS is a joint effort by the Attorneys General and heads of State Police in the six New England states to establish and operate a regional, multi-state intelligence system directed against organized crime. It was created as a result of a recognition by the principal law enforcement officials in New England that their individual efforts, and even their informally coordinated collective efforts, were not adequate to meet the challenge posed by organized crime activities in the region. They wanted to bolster the effort against organized crime, and do so within the traditional governmental structure, on a state rather than federal level.

The project came into existence on August 1, 1970, with the award of a substantial financial grant from the Law Enforcement Assistance Administration (LEAA) of the U. S. Department of Justice. Initial operations began on December 14, 1970, upon assignment of the first contingent of Intelligence Officers from the participating State Police agencies.

The basic objective of NEOCIS is to develop better procedures to determine the nature and extent of organized crime in the New England region. More specifically, it is the project's goal to develop details on the identity of key personnel, overall organizational structure, operational mechanisms, the spectrum of current activities, and most important, the specifics concerning future plans of organized crime. With this information, strategies against organized crime can be planned and steps can be taken toward coordinated regulation, enforcement, prosecution, and other means of control.

With the project barely two years old, it is impossible at this time to evaluate its effectiveness in reducing or limiting organized crime in the New England region. A private consulting firm is presently setting up an evaluation system to provide this information. Meanwhile, the Criminal Division continues to work as a part of NEOCIS to help it achieve its goals.

Outside of its involvement with NEOCIS, the Criminal Division has had somewhat limited activity in the area of organized crime up to this point. Over the past six years, the Division, in cooperation with the Bureau of Criminal Investigation of the State Police, has conducted approximately 165 investigations into organized crime activities. Most of these cases have been violations of State gambling and conspiracy laws in the southern part of the State.

Alcohol Related Driving Offenses

The Criminal Division has been active in combating alcohol-related driving offenses through its supervision of the four Assistant Attorneys General working in the Alcohol Safety Action Program (ASAP). The Alcohol Safety Action Program is a federally funded project in York and Cumberland counties, established for the purpose of reducing the number of fatalities, accidents and injuries caused by drunken driving. The program began in January of 1972, and will continue for a period of three years.

From January, 1972, to July, 1972, the program functioned with two prosecutors, one in Cumberland County and one in York County. During this period, the Portland District Court was covered, part of the load in Superior Court was covered, and the courts in York County were partially covered. From the period of July, 1972, to the present, the program has functioned with the full complement of four Assistant Attorneys General covering all courts in York and Cumberland Counties. Out of over 2,000 OUI arrests in 1972, nearly 1,600 defendants were found guilty, representing a nearly 80 percent conviction rate. During this period, less than 100 defendants were found not guilty.

During the period of ASAP prosecution, the prosecution of OUIs has been closely coordinated with the rehabilitation aims of the program. This entailed the systematic referral of defendants to rehabilitation officers. The rehabilitation officers have regularly perused the records of the defendants, interviewed the defendants, and spoken to the defendants' lawyers, in order to determine whether or not the given individual was a candidate for the rehabilitation program.

The prosecutors are presently doing research on a variety of legislative proposals which might facilitate the prosecution of drunken driving cases. Areas of legislative research include amending the penalty section of the Statute in such a way as to give defendant a greater incentive to get into a rehabilitation program, and amending the consecutive and current provision in the Refusal Section of the Statute.

Undercover Drug Investigations

The special session of the Maine State Legislature in 1972 passed an appropriations bill providing $34,000 to be utilized at the discretion of the Attorney General, for use in the detection or apprehension, or both, of persons involved in illegal drug activity. This money has been used by the Criminal Division to set up and coordinate an undercover drug investigation program throughout the State. (Actually, Cumberland County is not included in this project because it has received funds for similar purposes from the Maine Law Enforcement Planning and Assistance Agency.)

Several experienced undercover agents have been hired to carry out the investigative activity. The funds have been used primarily to pay for salaries, travel, and court appearances of these personnel. Some of the funds have also been used as "buy money."

Since this project only began in April, 1972, and there are still many cases pending court action, it is still too early to evaluate its impact.

General Criminal Complaints

Besides handling cases in the areas mentioned above, the Criminal Division daily receives complaints from private citizens with regard to a variety of other crimes. As a result, the Division has processed cases involving arson, embezzlement, extortion, sex crimes, child abuse, kidnapping, robbery, vandalism, breaking, entering and larceny, threatening communications, bribery, missing persons, and many other areas of criminal activity. In the past six years, approximately seven hundred fifty cases were investigated by this office, resulting in either prosecution or satisfaction of all complaints.

State Departments

In the last six years the Criminal Division has received approximately 125 complaints regarding alleged violations of State law from various State departments, including Health and Welfare, Fish and Game, Sea and Shore Fisheries, Agriculture and Education. All these complaints were investigated and all were resolved either by voluntary compliance after investigation or by court action.

Civil Rights

The Criminal Division has had limited activity in the area of civil rights. Over the past six years, the office has investigated and processed about 10 complaints. Notable among these was a complaint in 1968 from the NAACP alleging a violation of the housing discrimination law. Investigation and prosecution by the Criminal Division resulted in the first successful conviction in the State of an offense against the dignity of men.

Psychiatric Hearings

In the last two years the Criminal Division has become increasingly involved in psychiatric hearings to determine whether certain inmates of institutions for the mentally ill or retarded should be released or discharged. The Division becomes involved when there is a release or discharge hearing involving an inmate who has been committed to the institution because he was acquitted of a crime by reason of mental disease or defect under Section 103 of Title 15 of the Maine Revised Statutes. It is the duty of the Criminal Division to oppose such release or discharge if there is a question as to whether or not the inmate is sufficiently restored or adjusted so that he will not cause injury to himself or others. (15 M.R.S.A. §104) So far, the Division has participated in more than 35 such hearings.

Witness Immunity

In 1968, the State Legislature enacted a witness immunity statute (15 M.R.S.A. § 1314-A). The statute provides that any person who refuses to answer questions or produce evidence in a criminal proceeding on the ground that he may be incriminated thereby, may be compelled by the court to give such evidence. After complying, the witness may not be prosecuted or penalized for any matter for which he gave evidence if, but for this statute, he would have had the right to withhold the evidence given.

The Criminal Division has become increasingly active in moving for and conducting examinations of witnesses under the witness immunity statute since its passage. So far, attorneys for the Division have participated in approximately 55 such proceedings in connection with cases under investigation or prosecution by this office or the county attorneys.

It should be stressed that the Attorney General's office asks for immunity of witnesses only in cases where it is clearly demonstrated that without the testimony of such witnesses, a case could not be successfully prosecuted. Each request from a county attorney for witness immunity is carefully reviewed by the Criminal Division to determine whether it would be in the public interest for immunity to be granted by the Court. Only then will the Criminal Division recommend that the Attorney General request the court to grant such immunity.

ASSISTANCE TO COUNTY ATTORNEYS

As mentioned earlier in this report, the Criminal Division when originally established, served mostly to assist the various county attorneys in carrying out their duties.

Although the Division has greatly expanded its activities, it still places heavy emphasis on assisting the county attorneys. In fact, over the past six years, because of the growth of the Criminal Division, it has been able not only to increase the amount of assistance to the county attorneys but to expand the scope of that assistance.

District Court Workload

The main type of assistance provided by the Criminal Division to the county attorneys is helping in the prosecution of the daily caseload in District Court. The Division has sent staff attorneys to the various counties to prosecute complicated and difficult cases, cases where the part-time county attorney has a conflict of interest, and cases in areas where the workload is extra heavy. Several of the Criminal Division staff attorneys have received their initial prosecution training handling these District Court cases. Over the past six years, the Division has assisted county attorneys in over a thousand cases.

It is worthy of note that the Criminal Division has received some financial assistance from the Maine Law Enforcement Planning and Assistance Agency (MLEPAA) for assistance to county attorneys. In 1971, MLEPAA approved a grant of $5,000 to pay for travel expenses of Criminal Division staff attorneys prosecuting District Court cases in counties throughout the State.

Communications

On a regular basis, the Criminal Division receives inquiries from county attorneys relating to various aspects of criminal law and procedure, especially arrest, search and seizure, admissions and confessions, and identification. The Division researches these questions, when necessary, and renders appropriate advice in the form of verbal communication or written memorandum. Several hundred inquiries have been handled in this manner over the last six years.

The Criminal Division has attempted to keep in touch with the problems of the county attorneys and keep them informed as to continuing developments in criminal law and procedure in other ways. One way has been to conduct conferences of all newly elected county attorneys at the State House to discuss common problems, review changes in the law, and discuss other new developments. Three such conferences have been held in the past six years.

The other method of communication has been through the publications of the Law Enforcement Education Section of the Criminal Division. Briefly, the Education section publishes ALERT, a law enforcement bulletin containing articles on criminal law and procedure, case summaries, and recently passed legislation. It is also developing and will soon publish a law enforcement officer's manual, and is planning a prosecutor's bulletin and manual, all of which will be of use to the county attorneys.

EDUCATION OF CRIMINAL JUSTICE PERSONNEL

I have had a firm commitment to improving the quality of criminal justice in Maine. It has long been felt that one of the best ways of achieving this is through improved education and training of the personnel working within the criminal justice system. Therefore, through the Criminal Division I have taken several important steps toward providing improved educational and informational services to criminal justice personnel in the State.

Law Enforcement Education Section

The most significant accomplishment in the area of improving educational services

has been the establishment of the Law Enforcement Education Section in October of 1970. The Education Section was set up with the help of a grant from the Maine Law Enforcement Planning and Assistance Agency with federal funds appropriated under the Omnibus Crime Act of 1968. It began its operations with the publication of a new criminal procedure bulletin entitled ALERT in October of 1970. The purpose of this bulletin was to fulfill a crying need for current, accurate and well-presented information in the rapidly changing area of criminal law and procedure for criminal justice personnel in Maine. The first issue of ALERT contained a message from Attorney General Erwin, a main article on the law of search and seizure, new legislation on the sale and possession of marijuana, and summaries of important court decisions on criminal law and procedure from the Supreme Judicial Court of Maine and from other state and federal courts. Since the first issue, ALERT has been published every month under the same general format and has dealt in detail with topics ranging from arrest and pre-trial identification to the handling of bomb situations and testifying in court. This format gives the law enforcement officer in plain language an overview of the general limitations upon him and also shows him how the general guidelines apply in specific situations.

The ALERT Bulletin is mailed monthly to the homes of all judges, prosecutors, and law enforcement officers in Maine by means of a computerized mailing list. The original mailing list of about 1600 names has now grown to about 2400. Most of this growth has come from letters and calls from criminal justice personnel requesting that they be added to the mailing list.

Judging by letters received and by word of mouth, the response to the ALERT Bulletin has been exceptional. The Law Enforcement Education Section receives letters daily praising the bulletin, some also offering comments and suggestions for additions and improvements. It is now being used as a basic instructional text at both the Maine State Police Academy and the Maine Law Enforcement and Criminal Justice Academy.

It is worthy of note that the ALERT Bulletin has been well received even outside the State of Maine. It has come to our attention that many offices of the Attorney General throughout the country find the Bulletin of invaluable assistance. We have also received many requests to be added to the mailing list from other criminal justice personnel throughout the country. Several other offices of the Attorney General have requested assistance from us in formulating similar projects.

The Law Enforcement Education Section has used part of its alloted LEAA funds to purchase books in the criminal justice field to be used for research and general reference. At the time of this report, the Education Section had compiled a library of approximately 100 books and other publications. These books are used not only by attorneys in the Criminal Division but are made available to all criminal justice personnel in the State on a loan basis. Several hundred books have already been borrowed from the library under this arrangement.

Taking encouragement from the apparent success of the ALERT Bulletin and the Law Enforcement Library, the Law Enforcement Education Section has already begun expanding the scope of its activities. With the help of approximately $70,000 in grant funds from the Law Enforcement Assistance Administration (LEAA) the Education Section has already hired two full-time attorneys to work on several new projects relating to law enforcement education. Chief among these expansion plans is the publication of a permanent Law Enforcement Officers Manual which would provide comprehensive guidelines for law enforcement officers in Maine covering all aspects of their daily duties and responsibilities. The manual would be designed to be carried on the person of the officer at all times for his ready reference. Changes or additions to the manual to keep it up-to-date would be made through loose-leaf supplement sheets to be

published as needed.

Another aspect of the expansion plans is to provide more educational materials for prosecuting attorneys in the State. We are contemplating in this regard the development of a prosecutors manual, a monthly newsletter, and various other reference materials. The prosecutor's manual would cover all aspects of prosecuting a criminal case from the opening statement through the closing argument. It would explain how, when, and why certain procedures are followed, and would discuss basic trial strategy and procedure. The prosecutor's newsletter would cover current developments in the law, announcements of conferences and seminars, and other items of interest to prosecutors. Other suggested projects under prosecutor education are a central catalogued file for motions and a felony complaint form book.

I feel that the Law Enforcement Education Section should become a permanent part of state government rather than have to depend on LEAA funds for its existence. In accordance with this, the budget of the Attorney General for the coming biennieum has requested funds from the 106th State Legislature to establish permanently the Law Enforcement Education Section in the Criminal Division. This will enable the Education Section to plan and develop long range projects knowing that it will not be subject to a possible cutoff of LEAA funds.

Lecturing

I have required of the Criminal Division some educational effort in lecturing and instructing law enforcement groups throughout the State. Staff attorneys of the Criminal Division have conducted lectures mostly on narcotics and various aspects of criminal procedure on a regular basis over the past six years. Several hundred such lectures have been given during this period.

Furthermore, attorneys in the Division are part of the regular faculty at both the Maine Police Academy and the Maine Law Enforcement and Criminal Justice Academy. This involves teaching basic courses in criminal law and procedure to new recruits and bringing the law up to date to in-service trainees.

In 1971, the Criminal Division received a grant of approximately $6,600 from the MLEPAA to carry out this lecture program for law enforcement officers. The money was used to purchase a car and provide travel expenses for attorneys lecturing in different parts of the State.

Interns

In recent years the Criminal Division has obtained funds from the MLEPAA for law student interns to work in the Criminal Division during the summer months. The primary purpose of these internships is to acquaint law students with the operation of the office and expose them to the criminal justice field with an eye toward possible career opportunities in Maine in the future. The program has also worked to the benefit of the Criminal Division, however, as the students provided much needed research and other assistance to the staff attorneys. Since 1970, nine law students have taken part in the summer intern program.

The newest structural change in the Attorney General's Office came with the enactment by the Legislature in 1969 of the so-called little FTC law creating a Consumer Protection Division in the Office of the Attorney General and adopting the body of the federal law of the Federal Trade Commission together with its definitions and decisions into Maine law. This Consumer Protection Division, which is also known as the Consumer Fraud Division, is presently staffed by two attorneys, a secretary and a civilian investigator. It has had a remarkable record of accomplishment in the short time it has been active.

Using the route of the civil injunctive process and a civil discovery process, we have avoided to a large extent the problems created by the Bill of Rights provision applicable to criminal law. Addressing itself to unfair trade practices, such as fraud, misleading advertising, "bait and switch" advertising, turned-back automobile odometers and unfair and misleading sales practices in such fields as the sales of hearing aids, this young and hard-hitting division accomplished a great deal. It is obviously understaffed at every level and will have to be given a considerably higher priority if the job of protecting consumers in the areas where they ought to be and need to be protected is to be completelv done.

I wish in a report like this it were possible to single out all the individuals who ought to be recognized for their competence and devotion to duty and their good attitudes. I would have to say unequivocally that the personnel in the Attorney General's Office as I leave it, whether they be lawyers, investigators, secretaries or bookkeepers, are of remarkably high quality. The accomplishments of this office are really to be credited to their efforts. I have been able to lead and to guide them, but without their hard, dedicated and competent work, the job would not have been done.

As to the future, there are some things which I should not leave office without addressing myself to.

The greatest single need in the field of administration of criminal justice today is the creation of some kind of a system of full-time prosecutors under the supervision of the Attorney General. Over the past six years without success I have tried to convince the Governor and the Legislature that this is an idea whose time has come, and we must do something about the quality of the general prosecution in the State of Maine. This is not to impune or to criticize any individual county attorney, but simply to underscore that the part-time county attorney system as it presently exists in Maine and as the Legislature has attempted over the past few years to shore it up in one way or another is simply outmoded and does not answer the needs of the State. Politics unfortunately have crept into this, and good bills which were identical in every particular have failed in the past because of an argument over whether the Governor or the Attorney General should appoint the full-time prosecutors, even though there seems to be no argument that the Attorney General should supervise them and that they should be responsible to him.

This office has pioneered in two areas successfully to get changes in the law to help make more effective the prosecutor's job in view of the past decade's Supreme Court decisions which have generally made law enforcement more difficult than it once was. In the special session of the Legislature in January of 1968, the Legislature enacted and the Governor signed two important bills, one creating a State witness immunity act and the other allowing the State appeals on questions of law in criminal cases in certain limited areas. The witness immunity law is a general one and has worked very well in the State, as it was expected that it would. The right of the State to appeal on questions of law in criminal cases has been limited more than it properly should. I recommend that the Legislature look again at this act to try to determine more accurately when jeopardy attaches for a criminal defendant and to allow the State the right to appeal in matters of law up to that particular point, which in my judgment ought to be the moment that the jury retires to deliberate or when all the evidence is in from both sides in the trial of a criminal matter. We were unsuccessful in convincing the Legislature that it should enact a wire-tap law based upon the federal model with all the standards, safeguarding the use of a wiretap that presently obtain for a search warrant. This legislation is used in other states and by the federal government with good success. It is important, too, in the use of the prosecution of the criminal conspiracies in organized crime and, provided that it is court supervised in its use and application, there is no logical argument against its

passage. The opponents who have been successful to date have generally used emotional arguments based upon supposed breaches of privacy of the individual.

I have been of the opinion from the beginning that the Attorney General of the State of Maine should run at large for his office as is the case in three-quarters of the states of this country. Maine is the only state in which the Attorney General is elected by the Legislature, and in my opinion, this is too narrow a base and becomes quite partisan and political. The appointment of the Attorney General by the Governor whether intended or not makes him subject to the Governor's orders or wishes in subtle and indirect ways, if not in actual direct ones. The Attorney General quite simply should be answerable to the people of the State of Maine, not to the Governor, not to the Legislature, but to the people themselves. The examples of the other states of the union where the Attorney General runs for his office at large in the state for terms of either two or four years ought not any longer to be ignored. Concurrent with such a change, I would recommend that the Governor and Legislature seriously consider the creation of a Department of Justice. The first step was taken with the creation of a Department of Public Safety, but in a larger sense, the time is rapidly approaching when the State of Maine must consolidate all elements of law enforcement within one department and not continue with the erroneous assumption that all the police officers should be in one place and all of the prosecutors and legal advisers should be in another. There are departments of justice which can be used as models in many states of the United States. I hope that these two changes above mentioned can come soon in order to improve the quality of the administration of criminal justice from top to bottom within the state.

For me this has been a remarkable and rewarding experience. The Attorney General more than most, I believe, is caught up in the awareness and ideals of public service.

The office now has much more impact on peoples' lives and in their thoughts than it ever had before. The Legislature has become more aware of the importance of the office and will never again, in my judgment, be casual about its own relationship to it.

I leave the office after six years grateful for the privilege of having served the State of Maine as its Attorney General at a time when events and circumstances forced the Office into a position of significance. I did not do it alone. The most dedicated and competent men and women I have known deserve all the credit.

Respectfully submitted,

JAMES S. ERWIN
Attorney General

June 22, 1967
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Double exemption for widowed veteran under § 653

FACTS:

Several years ago a widow of a veteran became entitled to a tax exemption pursuant to 36 M.R.S.A. § 653 (D) which provides:

> D. The estates up to the value of $3,500, having a taxable situs in the place of residence, of the unremarried widow or minor child of any veteran who would be entitled to such exemption if living, or who is in receipt of a pension or compensation from the Federal Government as the widow or minor child of a veteran.

The widow was a nurse in World War I and a "veteran" within the statutory definition of 653 (E).

Subsection (C) of § 653 provides an exemption as follows:

> C. The estates up to the value of $3,500, having a taxable situs in the place of residence, of veterans who served in the Armed Forces of the United States during any federally recognized war period . . . when they shall have reached the age of 62 years or when they are receiving any form of pension or compensation from the United States Government for total disability, service connected or non-service connected, as a veteran . . .

QUESTION:

Whether one eligible as the widow of a veteran and eligible as a veteran is entitled to a double exemption from taxation.

ANSWER:

Yes, there is no implied limitation of a double exemption in the statute.

OPINION:

The statutory section under consideration sets forth various categories of veteran's exemptions, including one for the benefit of unremarried widows of veterans and one for veterans themselves.

There are certain prerequisites to be met before one is eligible for exemption, such as a residence requirement and the filing of an application. The statute is silent regarding the number of exemptions to which one might be entitled. "When a tax statute is susceptible of more than one interpretation the court will incline to the interpretation most favorable to the citizen." *Acheson v. Johnson,* 147 Me. 275, 281. See also, *Hanbro, Inc. v. Johnson,* 158 Me. 180.

SUBJECT:

Double exemption for widowed veteran under § 653

Here we have a statute capable of interpretation in one of two ways; i.e., either in favor of or against two exemptions by one individual. Other states have similar statutory exemptions. Connecticut, for example, specifically provides that only one exemption will be allowed in the case of double eligibility, as does Michigan. See CONN. GEN. STAT. ANN. §12-81 and MICH. STAT. ANN. §7.7 Massachusetts has a provision in the event that double eligibility exists. See MASS. ANN. LAWS, ch. 59 § 5 (22).

Since other states make specific statutory reference to the possibility of the existence of double eligibility, and Maine cases have spoken of ambiguities favoring the taxpayer (even though exemptions are generally strictly construed), the conclusion reached is that the taxpayer concerned here would be entitled to an exemption under subsection D as well as subsection C, for a total $7,000 of valuation.

JAMES M. COHEN
Assistant Attorney General

January 5, 1967

Joseph T. Edgar, Sec. of State

Chapter 421, sections 1 and 2 of the Public Laws of 1965, amends section 81 of Title 5 of the Revised Statutes by inserting after the first sentence of the second paragraph the following new sentence:

"The Secretary of State may appoint the Deputy Secretary of State subject to the Personnel Law."

Section 2 of the same Chapter immediately following states as follows:

"It is the intent of the Legislature that section 1 shall in no way affect the tenure of the office of the Deputy Secretary of State who shall receive a salary not less than the salary paid to him as of the effective date of this Act."

In view of the express language of section 2 above quoted that the Legislature in no way intended to affect the tenure of the office of Deputy Secretary of State, no other interpretation can be made of this language except that tenure for this office shall remain as it was prior to the enactment of the amendment. Inasmuch as the tenure of the office of the Deputy Secretary of State prior to the enactment of this amendment always coincided with the tenure of office of the Secretary of State himself, it is obvious that the tenure of the Deputy Secretary remains the same as the Secretary who appointed him.

It is my opinion that the tenure of the Deputy Secretary of State, appointed by your predecessor, expired when your predecessor's term expired, and that presently there is no one appointed or serving as Deputy Secretary of State. There will not be until you, yourself, appoint your own Deputy.

The Legislature apparently intended to give the protection of the Personnel Law to the Deputy Secretary of State in every respect except tenure, which it expressly did not change.

JAMES S. ERWIN
Attorney General

January 20, 1967
State Parks and Recreation

Lawrence Stuart, Director

Allagash Wilderness Waterway – Boundaries of Restricted Zone prior to and after survey.

FACTS:

By memorandum dated January 13, 1967 you have posed the following questions concerning timber cutting within 400 feet and 800 feet of the bounds of the watercourse within the Allagash Wilderness Waterway.

QUESTIONS:

"Until such time as the State takes title in fee to the restricted zone, does the landowner have the right to cut wood,

(a) from shoreline back 400 feet?

(b) between 400 and 800 feet?"

ANSWERS:

See opinion.

OPINION:

Section 3 of P. L. 1966, c. 496 (An Act Creating the Allagash Wilderness Waterway) provides:

> "Sec. 3. Contingent upon authorization and ratification of bond issue. This Act with the exception of section 4, shall not become effective unless the Legislature adopting this Act shall have by legislation authorized a bond issue in the amount of $1,500,000 to develop the maximum wilderness character of the Allagash Waterway, and unless and until the People of the State of Maine shall have ratified the issuance of bonds as set forth in such Act."

Thus, the Act establishing the Allagash Wilderness Waterway became effective December 28, 1966 the effective date of the ratification of the issuance of the bonds by the people of the State of Maine. Therefore, on December 28, 1966 a restricted zone within the Allagash Wilderness Waterway also was established. *12 M.R.S.A. §663, subsection 3.*

The exact limits of the restricted zone were not determinable on December 28, 1966. The Legislature of the State of Maine recognized that the exact limits of the restricted zone would not be determinable until the passage of a period of time from the effective date of the Act as the Legislature specifically provided that:

> ". . . . the boundaries of the restricted zone shall be determined by the Commission *after survey*. . . . " (Emphasis supplied) *12 M.R.S.A. § 663, subsection 3.*

The Legislature did specifically provide, however, that the restricted zone must be a minimum of 400 feet in width from the bounds of the watercourse and could be as much as 800 feet in width from the bounds of the watercourse. The determinative factor as to the exact limits is the preservation, protection and development of the maximum

wilderness character of the watercourse. *12 M.R.S.A. § 663, subsection 3.*

Thus, we know that all areas within 400 feet from the bounds of the watercourse must be within the restricted zone. As to the area between 400 feet and 800 feet from the bounds of the watercourse we know that this area would also be within the restricted zone if the required survey provides the commission with information that the additional area would be needed to preserve, protect and develop the maximum wilderness character of the watercourse. Within the 400 foot limit there can be no timber harvesting operations other than those operations specifically directed by the commission for the purpose of maintaining healthy forest conditions or for the purpose of correcting situations arising from natural disasters. *12 M.R.S.A. § 670, subsection 1* (A-B).

Within any or all of the area between 400 feet of the bounds of the watercourse and the outer boundaries of the waterway, the commission must require that a management plan be submitted to the commission before any cutting is allowed. This management plan and its provisions are specifically provided for by 12 M.R.S.A. § 670, subsection 2 (A) 1-4.

Upon receipt of the management plan the commission should immediately survey the area in question to determine whether or not an area in excess of the 400 foot minimum and not exceeding 800 feet from the bounds of the watercourse is necessary to preserve, protect and develop the maximum wilderness character of the watercourse. If a determination is made that a portion of the additional area not exceeding 800 feet from the bounds of the watercourse is needed to preserve, protect and develop the maximum wilderness character of the watercourse, the commission must refuse to permit any cutting within that additional area other than that permitted in the restricted zone.

JEROME S. MATUS
Assistant Attorney General

February 1, 1967
Forestry

Austin H. Wilkins, Commissioner

You have asked if the Forest Commissioner has, in effect, the right to lay out the public lots in the unorganized territory so that they will be included in the 400 to 800 foot boundary of the Allagash Wilderness Waterway.

The operative law is Title 30, Chapter 233, § 4151:

> "In every township there shall be reserved, as the Legislature may direct, 1,000 acres of land, and at the same rate in all tracts less than a township, for the exclusive benefit of such township or tract, to average in quality, situation and value as to timber and minerals with the other lands therein. In townships or tracts sold and not incorporated, the public reserved lots may be selected and located by the Forest Commissioner and the proprietors, by a written agreement, describing the reserved lands by metes and bounds, signed by said parties and recorded in the commissioner's office. The plan or outline of the lands so selected shall be entered on the plan of the township or tract in the commissioner's office, which shall be a sufficient location thereof."

While the Forest Commissioner is empowered to lay out certain reserved public lots by this section, he is clearly bound by the requirements, "*.... to average in quality, situation and value as to timber and minerals with the other lands therein . . . .*" (Emphasis supplied)

Anyone familiar with water courses, such as the Allagash, knows that the shore line for long distances may be nothing but flowage grass, swamp or other land of such character as to be economically valueless. Without reasonable knowledge of mineral formations including ores, sand and gravel in each township, the Forest Commissioner could be derelict in his duty if he simply laid off the public lots in strips 400 to 800 feet wide along water courses.

In my opinion, the Forest Commissioner not only ought not, but must not, ignore the quality, situation and value of the land when laying out public lots. This is particularly important when one remembers that the timber and grass rights were long ago sold to the land owners.

JAMES S. ERWIN
Attorney General

February 15, 1967

Honorable E. Perrin Edmunds
Chairman, Executive Council
State House
Augusta, Maine

Dear Mr. Edmunds:

I acknowledge receipt of your letter bearing today's date requesting an answer to the question posed therein.

You asked:

> "Can the Governor and Council authorize the issuance of bonds in anticipation of their ultimate need for the purpose of reinvesting the proceeds of those bonds at a higher rate of interest to earn money for the General Fund?"

The answer must be in the negative and will need a certain amount of explanation. By an Opinion of the Justices, 139 Maine 416, the Supreme Judicial Court in 1943 ruled on this same question. The Court said among other things:

> "Unless otherwise explicitly prohibited, the legislature has the power to authorize the refunding of valid outstanding obligations of the State, *but the issuance of bonds for that purpose an unreasonable length of time before the maturity of the indebtedness for the avowed and inseparable purpose of establishing an interim investment fund for gain and profit . . . will create a new debt or liability on behalf of the State in violation of the provisions of Section 14 of Article IX of the Constitution of Maine as amended.*" (Emphasis supplied.)

I think that this Opinion of the Justices clearly prohibits the procedure outlined in your question. The operative words are "an unreasonable time." I will not attempt to define a standard of reasonableness, but it would seem very clear to me that borrowing money by issuing authorized bonds in anticipation of a future need at a time not yet clearly determinable, would be unreasonable and the investing of the proceeds of such an issue at a higher rate of interest would fall under the ban of the Opinion of the Justices.

The standard of a reasonable time is inexact enough to create doubt in all but the clearest of circumstances. It is my opinion that whenever such a doubt may exist, the problem should be avoided by not borrowing the money. This does not mean that State funds may not be temporarily invested in short-term U. S. Government obligations. In fact, there could well be times when an obligation could exist so to invest idle funds. The ban is clearly upon the borrowing in anticipation of need for the purpose of reinvesting at a profit.

It appears that almost every bond issue authorizes the issuance of the bonds in question "from time to time." The reason is, of course, to take the guesswork out of anticipated need and to allow the Governor and Council to keep more current with the bond market and avoid long-term anticipated borrowing. It bears the fair implication that speculation as to high or low bond rates should be avoided.

By inter-departmental memorandum dated May 17, 1966, Deputy Attorney General George West gave an opinion to State Treasurer Eben L. Elwell concerning the validity of temporary loans. I concur with that opinion which is attached to this letter. The subject of the inquiry is in the same general area, but is not specifically on the point of your instant question.

Very truly yours,

JAMES S. ERWIN
Attorney General

March 7, 1967
Parks and Recreation

Lawrence Stuart, Director

Title to Accrued Land Areas at Drake's Island in Wells, Maine.

FACTS:

Certain beach areas on Drake's Island at Wells, Maine have accreted as a result of the construction of jetties by the United States Army Corps of Engineers.

QUESTION NO. 1:

Does the title to the accreted beach areas vest in the property owners whose deeds run to the ocean or does the title vest in the State of Maine?

QUESTION NO. 2:

Should a declaratory judgment be sought to ascertain title to the accrued beach areas?

ANSWERS:

See opinion.

OPINION:

"Rights in respect of additions to or conditions of land by accretion or reliction are governed, ordinarily, by the law of the State in which accretion or reliction occurs." *56 Am. Jur.* p. 897, Waters, § 482, and cases and annotations cited. Footnote 16.

We look to the law of the State of Maine and find three cases dealing with accretion. None of the three cases deal with accumulation of land brought about by artificial conditions, i.e., jetties, dams. *State v. Yates,* 104 Me. 360 (1908) dealt with the

terminous of a public street at Old Orchard Beach laid out in 1871 to the high water mark. Since 1871, the high water mark had moved by accretion about 88 feet seaward. The Court held, inter alia, that when the high water mark gradually extended seaward by accretion the public easement which was attached to it originally at high water mark went with it and the street ended at all times at high water mark. This case defines accretion as,

". . . the gradual and imperceptible accumulation of deposit of land by natural causes." Ibid at 362. *Babson v. Taintor,* 79 Me. 368 (1887) concerned a title dispute to flats between the mainland and an island. A channel between the mainland and the island had gradually filled up by accretion. Held title in owner of the mainland property. *King v. Young,* 76 Me. 76 (1884) concerned title to certain mussel beds. The Court held that a mussel bed over which the water flows at every tide is not an island. Such formations were considered flats and if within 100 rods at high water belonged to the owner of the adjoining land if not covered by water when the tide was out. The Court ruled that accretion must be gradual and from the shore outward.

Our Court's definition of "accretion", *State v. Yates,* supra., on its face could be argued as not being applicable to a five-year accumulation of land as a result of the building of a jetty which are the facts in the instant case. It could be argued that the build-up was not accretion as it was not a deposit of land by natural causes, that is, it was the jetty, an artificial object, which was really the proximate cause of the deposit of the land and that the sea and wind were merely incidental causes which followed in an unbroken sequence from a proximate cause which was not a natural cause. I do not believe our Courts would accept this argument. An annotation at 134 A.L.R. 467 contains a series of cases which makes it clear there is a distinction in many jurisdictions between an artificial condition (a jetty) and an artificial cause. The annotation is titled, "Waters: Rights in respect to accretion or reliction due to artificial conditions." The annotation states as a rule that "generally a riparian owner is precluded from acquiring land by accretion or reliction, notwithstanding the fact that the accumulation is brought about by artificial obstructions erected by a third person where the riparian owner had no part in erecting the artificial barrier." 134 A.L.R. 468. The cases cited include a United States Supreme Court Decision, *St. Clair Court v. Livingstone,* (1874) 23 Wall 46, 23 L. Ed. 59; decisions from eleven state jurisdictions including Massachusetts, New York and Rhode Island and an English Decision. Of particular interest is *Burke v. Commonwealth* (1933), 283 Mass. 63, 186 N. E. 277, in which the Massachusetts Court expressed the view that the circumstances of building of breakwaters by public authority may have aided the operation of natural cause in the deposit of the accretion but did not modify the general rule that the littoral proprietor is entitled to his proportionate share of such accretions. The English decision *Brighton and H. General Gas Co. v. Hove Bungalows,* (1924) 1 Ch (Eng) 372, 13 BRC 183, is also of interest. The annotation states that this decision held "that the general law of accretion applies to a gradual and imperceptible accretion to land abutting upon the foreshore, brought about by the operation of nature, even though it had been unintentionally assisted by, or would not have taken place without, the erection by the public of groins for the purpose of protecting the shore from erosion. . . ." 134 A.L.R. 469.

The 134 A.L.R. annotation distinguishes the situation where a condition is created by the claimant. The annotation states, "in general a riparian owner cannot claim title to land aided by accretion or formed by reliction as a result of creating by himself an artificial condition causing the accretion or reliction. We do not have this type of a factual situation.

In "Shore and Sea Boundaries" by Aaron L. Shalowitz, Vol. 2 at page 538, the

author states, "A variant of the accretion doctrine is where changes in shoreline are brought about by natural causes but induced by artificial structures, as, for example, where jetties or breakwaters have been built, and thereafter, by gradual and imperceptible processes, accretions to the shoreline occur as a result of the artificial structures. The rule applied in the Federal Courts is to treat such changes as natural accretions for the benefit of the adjacent riparian owner. [122]" Footnote 122 distinguishes the rule applied in Federal Courts from the rule in California where accretions so added are regarded as artificial in character and as against the state or its grantee the riparian owner is not entitled to claim such accretions. *Carpenter v. City of Santa Monica,* 147 P. 2d 964 (1944). The California rule is a minority rule. Also see *Dana v. Jackson Street Wharf Co.,* 31 Cal. 118, 89 Am. Decisions 164, in which case it was held that the owner of a lot on the waterfront of San Francisco did not become the owner of land adjoining the lot and lying in the harbor beyond it where such land had been gained from the sea by the gradual accretion of sand and earth caused by a purpresture, or encroachment in the form of a wharf in the public harbor.

I am of the opinion that our Court will follow the majority rule and not the rule of California.

It may be further argued that the accumulation of sand on Drake's Island would not be considered an accretion because the accumulation was not gradual or imperceptible, which is necessary in order to have accretion. I am of the opinion that our Courts would consider this deposit of sand as gradual and imperceptible.

". . . the word 'imperceptible' as used in this rule means that the accretion is imperceptible in its progress although it may be perceptible after a long lapse of time. As stated in some cases, the test as to what is gradual and imperceptible in the sense of the rule is that although the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. According to some authorities, it is not necessary that the formation be one not discernible by comparison at two distinct points of time, but it has been said that the length of time during formation is not material if the increment added is utterly beyond the power of identification." *56 Am. Jr. 898, § 484.*

For a general study of the doctrine of accretion I refer to "Shore and Sea Boundaries" by Shalowitz, Vol. 2, pages 536 through 541.

CONCLUSION:

In my opinion title to the accreted beach areas is vested in those property owners of lots whose deeds run to the ocean. It does not belong to the State of Maine beyond being subject to the Colonial Ordinance of 1641-47.

In view of the foregoing, I do not believe it would be useful to seek a declaratory judgment concerning the problem as the cost would be too great and the chance of success remote.

JEROME S. MATUS
Assistant Attorney General

March 28, 1967

Honorable Louis Jalbert
House of Representatives
Augusta, Maine

Re: Meaning of "Two-Thirds Vote"

Dear Louis:

You have asked me to clarify the law with respect to the meaning of a two-thirds vote required to override a Governor's veto. Attached to this letter you will find the letter of February 12, 1965, which Attorney General Dubord wrote to Speaker Dana Childs. This letter covers the question of two-thirds vote in the case of Constitutional amendments and emergency legislation. My answer to your inquiry is an extension of the opinion and logic used by Attorney General Dubord.

Accepting the premise that the word "House" means a quorum of its membership, I interpret the requirement of a two-thirds vote necessary to override the veto of a Governor to mean two-thirds of the members present and voting, assuming there is a quorum. It is my opinion that in the absence of clarifying language, the same standard is used for the overriding of a veto that is used for the passing of a Constitutional amendment.

As pointed out by Attorney General Dubord in his letter of February 12, 1965, the only place where the Constitution in terms requires "a vote of two-thirds of all the members elected to each house" is for emergency legislation. This requirement was apparently dictated by the fact that emergency legislation denies the people their right of referendum.

No such special consideration obtains in the matter of overriding a veto and the requirement only speaks in terms of the "House." As stated above, we consider this to mean those present and voting (assuming a quorum). I refer again to the cases cited by Attorney General Dubord.

With the hope that this is useful to you, I am

Very truly yours,

JAMES S. ERWIN
Attorney General

April 27, 1967
Executive

Linwood Ross, Special Assistant

Voting Rights of Indians Residing on Tribal Reservations.

By memorandum dated April 27, 1967, you asked the following question: Whether an Indian residing on a tribal reservation has the right to vote for a State Representative to the State Legislature?

ANSWER:

Yes, as qualified by this opinion. There is no doubt that the amendment to Article II,

section 1 of the Maine Constitution in 1953 provided Indians with the right to vote for voting representatives to the State Legislature.

The Resolve passed by the Legislature proposing the constitutional amendment to Article II, section 1 and Article IV, Part 1st, section 2 stated in part:

> "Form of question and date when amendment shall be voted upon. Resolved: That the aldermen of cities, the selectmen of towns and the assessors of the several plantations of this state are hereby empowered and directed to notify the inhabitants of their respective cities, towns and plantations to meet in the manner prescribed by law for calling and holding biennial meetings of said inhabitants for the election of senators *and representatives* at the next general or special state-wide election, to give in their votes upon the amendment proposed in the foregoing resolution, and the question shall be:
>
> " 'Shall the constitution be amended as proposed by a resolution of the legislature permitting Indians to vote?' " (Emphasis supplied)

Thus it is clear that the intent of the Legislature in amending Article II, section 1 of the Maine Constitution by adding the sentence "Every Indian, residing on tribal reservations and otherwise qualified, shall be an elector in all county, state and national elections." was to provide those Indians with the same voting rights as any other citizen of the State of Maine.

The Reapportionment of the State House of Representatives as promulgated by Chapter 81 of the Resolve of 1961 failed to specifically provide representation for Indians residing on tribal reservations. Therefore, it would be incumbent upon the Legislature by an appropriate action to provide this representation which is guaranteed by the Constitution of the State of Maine.

JEROME S. MATUS
Assistant Attorney General

April 28, 1967
Maine State Prison

Warden Allan L. Robbins
Forcing Medical Treatment on Prisoners at the Maine State Prison

FACTS:

From time to time prisoners at the Maine State Prison suffering from illness refuse medical treatment and diet prescribed by the prison physician.

QUESTION:

Can medical treatment and diet prescribed by the prison physician be forced upon prisoners at the Maine State Prison?

ANSWER:

No.

OPINION:

It is the opinion of this office that despite the powers of control of prisoners vested

in the Warden of the Maine State Prison, such powers do not include the power to force medication and diet upon any prisoner against his will, subject to the exception that in instances wherein a prisoner becomes violent and uncontrollable, and thus detrimental to the peace and wellbeing of the prison, the administration of tranquillizing drugs against the prisoners' will may be necessary for the preservation of the good order of the prison.

It is our opinion that when a prisoner refuses medical treatment or diet prescribed by the prison physician the physician should explain the reason for the requirement of medical treatment or diet and the possible ill affects if treatment or diet is refused. If refusal persists the physician should make a statement in writing, indicating the nature of the refusal of treatment or diet, describing the explanation of the consequences of refusal given to the prisoner and stating the fact of persistence of refusal. The statement should be signed by the physician and dated; it should be signed by the recalcitrant prisoner, and witnessed, and if he refuses to sign the same it should be indicated on the form and witnessed. The completed form should be made a part of the prisoner's record.

Title 34, M.R.S.A., 1964, § 631 makes mandatory the furnishing of needed medical treatment or diet, but does not authorize the forcing of either.

COURTLAND PERRY
Assistant Attorney General

May 2, 1967
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Property Taxation of property owned by Urban Renewal Authorities.

FACTS:

Prior to April 1, 1967, the Fort Fairfield Urban Renewal Authority acquired certain property from several individual owners. Most of the original owners have vacated the premises and the buildings have been demolished. However, one or two of the original owners continue to occupy their premises and will continue to do so until at least June of 1967. These individuals are paying rent to the Fort Fairfield Urban Renewal Authority.

QUESTION NO. 1:

Whether property acquired by an Urban Renewal Authority prior to April 1, is taxable to the authority?

ANSWER:

No.

OPINION:

Property of an Urban Renewal Authority acquired pursuant to 30 M.R.S.A. § 4813 is declared to be public property and not taxable.

QUESTION NO. 2:

Whether property owned by an Urban Renewal Authority and rented by it to former owners is taxable?

ANSWER:

No.

OPINION:

Applicable statutory provisions:

Exemption from taxes and execution. . . .

> The property of the authority is declared to be public property used for essential public and governmental purposes and such property and the authority shall be exempt from all taxes of the municipality, the State or any political subdivision thereof, provided that with respect to any property in a renewal project, the tax exemption provided herein shall terminate when the authority sells, leases or otherwise disposes of such property to a redeveloper for redevelopment. (30 M.R.S.A. § 4813)

Since property of an Urban Renewal Authority is public property, the tax exemption continues until such time as the property is transferred to a developer for redevelopment.

Because of the specific language of the statute declaring the use of such property to be public and tax exempt, it becomes unnecessary to discuss the provision of 36 M.R.S.A. § 651 (1) (D) and cases interpreting it.

JAMES M. COHEN
Assistant Attorney General

May 10, 1967
State Police

Major Ralph E. Staples, Deputy Chief

In your memorandum of April 14, 1967, you ask for a determination of the maximum gross weight allowance under 29 M.R.S.A. § 1652 for a tri-axle commercial vehicle transporting commodities other than those specified in 29 M.R.S.A. § 1655.

In answer to your question, the statute provides that no vehicle having 3 axles shall be operated over any way or bridge when the gross weight exceeds 51,800 pounds. This applies to vehicles having a distance of 29 feet between extremes of axle groups. Vehicles having axle groups of lesser distance apart are limited by the table contained in the statute to a particular maximum load according to the length apart of such axle groups.

The statute also provides that no vehicle shall have a gross weight imparted to any road surface of more than 22,000 pounds on any one axle, and that no vehicle having 2 or more axles less than 8 feet apart shall be operated with more than 18,000 pounds imparted to the road surface from either axle or 36,000 from both axles. Two or more axles less than 4 feet apart are considered as one axle.

If 3 axles are each more than 4 feet apart from the adjacent axle, but less than 8, then each may impart a maximum of 18,000 pounds, *subject to the overall gross weight limitation for a tri-axle vehicle of 51,800 pounds.* If 2 of the axles are less than 4 feet apart, the vehicle is considered to be a 2-axle vehicle, which cannot exceed a gross weight of 32,000 pounds.

The apparent conflict caused by the 3-axle limit with the 51,800 pound limit must be resolved in favor of the overall limit. Up to that limit of 51,800 pounds, each of 3 axles in a grouping of less than 8 feet may carry not more than 18,000 pounds. The practical limit for each axle would be 51,800 divided by 3, or 17,266 pounds per axle in a group of 3 located less than 8 feet apart. Of course, 2 axles less than 8 feet apart, but more than 4, could carry 18,000 pounds each.

JAMES S. ERWIN
Attorney General

May 19, 1967
Banks & Banking

Alden H. Mann, Director
Division of Securities

Title 9, Chapter 51; Legal Investments for Savings Banks.

FACTS:

Title 9, c. 51 of the 1964 Maine Revised Statutes controls the investments of Maine Savings Banks in securities.

A cumulative preferred stock issue of a public utility has not qualified as a legal investment for savings banks under subparagraph 5 of 9 M.R.S.A. § 608, which is the section in Title 9, c. 51 setting forth the criteria for investments in preferred stocks by Maine Savings Banks.

QUESTION:

May this issue of preferred stock of a public utility be purchased by savings banks under 9 M.R.S.A. § 610, as amended, the so-called prudent man section, even though it fails to qualify under 9 M.R.S.A. § 608?

ANSWER:

No.

OPINION:

The so-called prudent man section permitting investments by Maine Savings Banks reads as follows:

> "Savings banks may hereafter invest: *In such other securities* as the trustees of a bank may consider to be sound prudent investments.
>
> "Not more than 10% of the deposits of a bank shall be invested in securities within the coverage of this section." *9 M.R.S.A. § 610, as amended by P. L. 1965, c. 335, § 12.* (Emphasis supplied)

In the context of 9 M.R.S.A. § 610 the reference to "in such other securities" is a reference to the securities other than those falling within categories established by 9 M.R.S.A. §§ 592 through 608. If a security falls within such a category, as in the instant fact situation, the preferred stock of a public utility, it must qualify under that specific section, otherwise the security is not a legal investment for savings banks. The

Legislature would not establish categories and then permit a security that did not qualify under a category to qualify under a prudent man section. The prudent man section was established to deal with investments in categories that were not established by a specific section of the savings bank investment law (9 M.R.S.A. Chapter 51).

To illustrate, under the prudent man section, an investment in a share of an industrial corporation other than a Maine industrial corporation would be permitted if the trustees of a bank considered such an investment to be a sound prudent investment and provided that no more than 10% of the deposits of the bank were invested within the coverage of the prudent man section. *9 M.R.S.A. § 610.* Stock of industrial corporations other than a Maine corporation is a category that is not established by sections 592 through 608 and therefore the prudent man section could be applied.

In the instant fact situation, there is a category dealing with preferred stock of public utilities – 9 M.R.S.A. § 608 – and therefore the prudent man section could not be used.

JEROME S. MATUS
Assistant Attorney General

June 1, 1967
State

Joseph T. Edgar, Secretary of State

FACTS:

The number of pardon petitions appears to be increasing. It has been customary through the years for the Governor and Council to hold pardon hearings once every two months. The increase in the number of petitions makes the pardon sessions unusually long and burdensome. The Governor and Council are exploring the possibility of holding the pardon hearings each month.

QUESTION NO. 1:

Must pardon hearings be held every two months or may the hearings be held each month?

ANSWER:

See opinion.

OPINION:

The Constitution of the State, Article V, Part First, Section 11, sets forth the authority of the Governor with the advice and consent of the Council to grant pardons. This power is given "subject to such regulations as may be provided by law, relative to the manner of applying for pardons."

The Legislature, by 15 M.R.S.A. §§ 2161 – 2166, has set forth the restrictions, limitations and regulations relative to the manner of applying and granting of pardons.

There is nothing in the above-cited statutes which states the time of holding pardon hearings. This is a matter which is within the jurisdiction of the Governor and Council. They may hold pardon hearings as frequently as they so decide.

QUESTION NO. 2:

May a pardon hearing be scheduled for a date later than the next scheduled hearing date?

ANSWER:

Yes.

OPINION:

In view of the answer to question No. 1 above, it automatically follows that the Governor and Council may schedule pardon hearings when they wish to hold them. The only limitation is that set forth in 15 M.R.S.A. § 2161, which provides that "written notice thereof shall be given to the Attorney General and the County Attorney for the county where the case was tried at least 4 weeks before the time of the hearing thereon, and 4 weeks' notice in some newspaper printed and published in said county."

As long as the Governor and Council give at least 4 weeks' notice to the Attorney General and the County Attorney and the notice is published at least 4 weeks prior to the scheduled date of the hearing, it is not necessary that the pardon be scheduled for the next meeting of the Governor and Council, or the next meeting of the Governor and Council at which other pardons have been scheduled.

GEORGE C. WEST
Deputy Attorney General

June 15, 1967
Banks and Banking

Irl E. Withee, Deputy Bank Commissioner

Three-year loan limitation of industrial banks.

FACTS:

You have requested by memorandum, rulings on the three-year loan limitation of industrial banks prescribed by 9 M.R.S.A. § 2381, subsection 2, as amended by P. L. 1965, chapter 454.

QUESTIONS:

1. Will a renewal, either in full or in part of a 3-year loan, be construed to be in violation of the section?
2. If a payment or payments on a 3-year loan should be in arrears, will an extension of such payment or payments beyond the maturity of the loan be construed to be in violation of the section?

ANSWERS:

Question No. 1: Yes.
Question No. 2: Yes.

OPINION:

9 M.R.S.A. § 2381, subsection 2, as amended by P. L. 1965, chapter 454 reads as follows:

"§2381. Unlawful acts

"No industrial bank shall:

"...

"2. Loan limitations; 3-year limit. Make any loan for a longer period than 3 years from the date thereof, except in the case of loans that are eligible for insurance under the National Housing Act and for the insurance of which under that Act seasonable application is made pursuant to the National Housing Act, Title I;"

Thus it is clear that the Maine Legislature has placed a three-year limitation on the period of time assets of an industrial bank can be placed at risk in the form of a loan to the borrower. (Except in the cases of loans that are eligible for insurance under the National Housing Act for the insurance of which seasonable application is made under that Act.)

A renewal either in full or in part of a three-year loan by an industrial bank beyond a three-year period from the original making of the loan would effectively place at risk assets of the industrial bank beyond a three-year period. The extension of a payment or payments on a three-year loan beyond the maturity date of the loan would have the same effect. Thus, in our opinion, a renewal or extension of a loan by an industrial bank beyond a three-year period would abrogate the provision of 9 M.R.S.A. 2381, subsection 2, as amended by P. L. 1965, chapter 454 and be unlawful.

JEROME S. MATUS
Assistant Attorney General

August 17, 1967
Banks and Banking

Irl E. Withee, Deputy Commissioner

Addendum to Opinion of June 15, 1967.

A request has been made for a clarification of my opinion dated June 15, 1967 relating to the 3-year loan limitation of industrial banks. My opinion is unchanged. However, in respect to my answer to Question No. 1, it is necessary to establish what is meant by the word "renewal". The word "renewal" when applied to a note means the continuance of the old obligation, including the obligation of all parties liable thereon. Sproul v. Beskin, 166 N.Y.S. 606, 608, 179 App. Div. 275. If a note is renewed by an industrial bank beyond the 3-year limitation, the loan is in violation of 9 M.R.S.A. § 2381 (2). However, if a note is marked paid and returned to the borrower and an obligation in the form of a new note is entered into between the same borrower and the same industrial bank, we have a novation at law, i.e., an entirely new obligation. See *Seaboard Finance Company v. Schaefer, et ux,* [69 D.&.C. 147 (1949) Pa.]. In *Beneficial Finance Company (Maine) v. John C. Fusco,* 160 Me. 273 (1964), there was a contention of a violation of the small loan statute prohibiting compounding of interest. The Maine Supreme Court upheld the opposite contention of the finance company that when the parties executed a note for the purpose of the defendant borrowing additional money and paying off the original note, the unpaid accrued interest became transferred into principal in the new note. Although the *Beneficial Finance Company* case, supra, related to compounding of interest under our small loan law, I am of the opinion that the same rationale would be applied to the question of whether or not there is a violation of the 3-year loan limitation by industrial banks established in 9 M.R.S.A. §

2381 (2); and that if a new note is executed between a borrower and an industrial bank at the end of a 3-year period, the new note is a separate obligation and is not a "renewal" in a legal sense.

My answer to Question No. 2 needs very little clarification. The word "extension" or "to extend" can be used interchangeably with "renewal" or "to renew". *Appon v. Belle Isle Corp.*, 46 A. 2d 749, 29 Del. C.H. 122. If a note is "extended" beyond the original 3-year period, it is in violation of 9 M.R.S.A. § 2381 (2).

JEROME S. MATUS
Assistant Attorney General

June 23, 1967
Parks and Recreation

Charles P. Bradford,
Supervisor of Historic Sites

Ownership of the Wreck of the Angel Gabriel.

FACTS:

An amateur diver has been researching in the New York City library the wreck of the Angel Gabriel of Pemaquid of the early settlement.

Should he locate it, he would donate the artifacts, if they are his, to either the State of Maine or the Pemaquid restoration.

QUESTION:

Should the amateur diver or anyone else locate the wreck, to whom does the wreck and its contents belong?

ANSWER:

The State of Maine.

OPINION:

The wreck and contents of Angel Gabriel would be derelict. A vessel is derelict in the maritime sense of the word when it is abandoned without hope of recovery or without intention of returning to save it. *Merrill v. Fisher,* 91 N.E. 132 at 133, 204 Mass. 600. For other definitions of the term derelict, see *12 Words and Phrases, p. 308 to 310.* A derelict is subject to salvage and either a vessel or its cargo may be derelict. It has been laid down in general terms that to constitute a derelict in the maritime law in respect of salvage, it is necessary, and according to some cases, sufficient, that the thing is found deserted or abandoned on the seas whether it arose from accident or necessity or voluntary dereliction. *78 C.J.S., Salvage, §30, p. 501.*

We assume, for purposes of this opinion, that the Angel Gabriel is lying within three miles of the coastline of the State of Maine. This being so, the wrecked vessel would be lying within the territorial waters of the State of Maine. The Submerged Land Act of 1953 provides in part that:

"The seaward boundary of each original coastal State is approved and

confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries." *43 U.S.C.A. § 1312.*

The Submerged Land Act has established the State's title to land within the three-mile limit and alleviates the ruling in *United States v. California* where the Court said:

". . . We cannot say that the 13 original colonies acquired ownership to the three mile belt or the soil under it, even if it did acquire elements of sovereignty of the English crown by their revolution against it." *United States v. California,* 332 U.S. 19 at p. 31, 67 S. Ct. 1658 (1947).

As the State of Maine is a common law state, if there is no statutory provision relating to the ownership of derelict property within territorial waters, the common law prevails. We have found no applicable statutory reference. Therefore, we look to the common law of England and have ascertained that:

". . . A wrecked vessel and its cargo, lying at the bottom of the sea, is a 'derelict' which, if not claimed by the owner, at the end of a year, becomes a droit of the Crown in its office of Admiralty. H.M.S. Thetic (1835) 3 Hagg. 228, 166 Eng. Repr. 390, 391. See also the Tubantia (1924) P. 78, 91; The King v. Two Casks of Tallow (1837) 3 Hagg. Adm. 292, 166 Eng. Repr. 414; and The Aquila (1798) 1 C. Rob. 37, 165 Eng. Repr. 87, 91." *State v. Massachusetts Company,* 95 S. 2d 902 at 905 (1957).

In *State v. Massachusetts Company,* supra, the State of Florida by and through its Attorney General brought suit against a joint venture and salvage company to enjoin the salvage company from salvaging the abandoned wreck of the old battleship Massachusetts which had been scuttled and sunk in 1922 in the Gulf of Mexico approximately 1.2 miles off the entrance to Pensacola Bay. The Supreme Court of Florida held that the wreck belonged to the State of Florida in its sovereign capacity. Relying on the reasoning set forth in *State v. Massachusetts Company,* supra, we are of the opinion that the Angel Gabriel and its cargo belong to the State of Maine in its sovereign capacity.

JEROME S. MATUS
Assistant Attorney General

July 12, 1967
Department of State

Joseph T. Edgar, Secretary of State

An Opinion on Chapter 9, Title 29, "Financial Responsibility and Insurance"

FACTS:

You have requested this office to issue an opinion interpreting certain provisions of Me. Rev. Stat. Ann., Tit. 29, ch. 9 (1964), commonly called the Maine Motor Vehicle Financial Responsibility Law.

As you have given them to us, the facts upon which the need for opinion arises are as

follows: An uninsured motor vehicle operator was involved in an accident causing property damage apparently exceeding $100. The Secretary of State, has, in accordance with Me. Rev. Stat. Ann., Tit. 29, § 783(2)A (1964), ordered the operator to file a certificate of insurance as proof of future financial responsibility or suffer the loss of his license and/or registration privileges. The operator contends that he should not be required to file until he has had a hearing before the Secretary of State, presented his argument as to why he should not file, and received an adverse ruling.

QUESTION:

The question presented for opinion is whether the Secretary of State may validly invoke the penalties of the Maine Motor Vehicle Financial Responsibility Law against an uninsured motor vehicle operator who has been involved in an accident causing property damage apparently exceeding $100 and who has failed to furnish a certificate of insurance as proof of future financial responsibility, *prior to* any administrative determination, by way of hearing, of such operator's liability to comply with the filing requirements.

ANSWER:

The pertinent statute, Me. Rev. Stat. Ann., Tit. 29, § 783(2)A, reads as follows:

"Upon receipt by him of the report of an accident, which has resulted in death, bodily injury or *property damage to an apparent extent of $100 or more, the Secretary of State shall, 30 days following the date of request for compliance with the 2 following requirements, suspend the license or the right to obtain a license, or revoke the right to operate of any person operating, and the registration certificates and registration plates of any person owning a motor vehicle,* trailer or semi-trailer *in any manner involved in such accident, or the right to register the same unless such operator or owner or both:*

" * * * .

" (2) *Shall immediately give and thereafter maintain proof of financial responsibility for 3 consecutive years next following the date of filing the proof as provided under section 787, subsection 2.* The Secretary of State may waive the requirement of filing proof after 3 years from the date of the original filing thereof." (Emphasis supplied.)

Under the cited statute, the Secretary of State must invoke the penalties of the statute against the operator in this case unless: (1) The certificate of insurance is filed within 30 days from the date such filing is requested; or (2) within such 30-day period, the operator demonstrates to the Secretary's satisfaction that he (the operator) falls within one of the filing exemptions established by Me. Rev. Stat. Ann., Tit. 29, § 783 (3) (1964). To prolong the invocation of the statutory penalties beyond the 30-day grace period in order to await the outcome of a hearing would violate the mandatory language in the statute.

Though the statutory language disposes of the question presented, two additional points will be made in this opinion. First, the invocation of the statutory penalties against this operator does not, in my view, represent a violation of due process. The Secretary deprives the operator of a privilege – not a "property right" in the traditional sense of the phrase. The use of the State's highways is a use which may be regulated in the interest of the motoring public by lawful exercise of the State's police power. Second, it is submitted as a policy consideration that should the operator in this case,

having filed in order to avoid the statutory penalties, then be relieved from filing as the result of a hearing *after* the expiration of the 30-day period and cancel his insurance, his out-of-pocket expense for insurance premiums would be negligible. The protection afforded to the motoring public by imposing the filing requirement during the period when the operator's liability for filing is in doubt far outweighs the minimal financial burden on the operator.

ROBERT G. FULLER, JR.
Assistant Attorney General

July 21, 1967
Agriculture

Paul J. Eastman, Deputy Commissioner

Interpretation of Section 2104, Title 7 of the Revised Statutes.

FACTS:

The law provides that a grower of certain crops or grain seeds may make application to the Commissioner of Agriculture for the inspection and certification of said crops or seeds. The growers enter into a contractual agreement to pay into the State Treasury a fee for the inspections and certification. (7 M.R.S.A. § 2101-2103)

7 M.R.S.A. § 2104 provides as follows:

"No person who is in arrears as to payment for past services of the department under sections 2101 to 2103 shall be entitled to further services until payment of all such arrears shall have been made."

In essence you have asked the following question:

QUESTION:

Are delinquent debts owed the state which have been written off by the Governor and Council still considered to be owed the state and may the Department of Agriculture collect such debts under the terms of 7 M.R.S.A. § 2104 quoted above?

ANSWER:

See opinion.

OPINION:

The legislature has provided that under certain conditions the state or one of its agencies or departments may charge off certain debts.

5 M.R.S.A. § 1504 Charging off accounts due state

"The State Controller shall charge off the books of account of the State or any department, institution or agency thereof, such accounts receivable, including all taxes for the assessment or collection of which the state is responsible, and all impounded bank accounts, as shall be certified to him as impractical of realization by or for said State, department, institution or agency. Such certification shall be by the Attorney General, the Commissioner of Finance and Administration and the Treasurer of State, subject to the approval of the Governor and Council. In

each such case, the charging off of such accounts shall be recommended by the head of the department, institution or agency originally responsible for such account." (Emphasis supplied.)

The charge off of a contractual debt owed the state by a debtor is not an extinguishment or discharge of the debt itself. Such a charge off actually represents an administrative determination by the state as creditor that the debt which is owed is for all practical purposes uncollectible as a bad debt. In other words, the legislature has merely provided in 5 M.R.S.A. § 1504 that the state as creditor may elect not to attempt to enforce certain contractual obligations. This does not mean that a debt which has been written off by the state may never be collected in the future however.

The language of 7 M.R.S.A. § 2104 quoted in the factual situation provides in effect that a delinquent debtor must pay for past indebtedness incurred for services rendered by the Department of Agriculture as a condition precedent to the receipt of further similar services by the Department. This is true whether or not such past indebtedness was at one time written off by the state as being uncollectible.

We believe that it is entirely proper for the legislature to provide that the state demand payment of prior debts for services rendered as a condition precedent to the supplying of further similar services to a debtor.

The Department of Agriculture, as creditor, may elect not to enforce the payment of a contractual debt pursuant to the terms of 5 M.R.S.A. § 1504. Read in conjunction with the language of 7 M.R.S.A. § 2104 however, we do not believe that the Department may excuse the payment of past contractual indebtedness incurred by a debtor and at the same time, enter into new contractual agreements to provide further services to said debtor.

PHILLIP M. KILMISTER
Assistant Attorney General

August 2, 1967
Maine State Retirement System

E. L. Walter, Executive Secretary

P. L. 1967, Chapter 59 – Relationship of Board of Trustees of the Maine State Retirement System and a Bank Fiduciary Employed by said Board.

FACTS:

Because of certain statutory amendments to the law governing the administration of the Maine State Retirement System, you have asked two general questions relative to the responsibility and authority of the Board of Trustees and a bank fiduciary to be employed by the Board. In reference to recently enacted statutory language you have asked the following questions:

QUESTION NO. 1:

Does the phrase "the framework of the general investment policy of the Board of Trustees" imply that the Board is limited to making policy or may the Board give instructions in detail or to any degree between these two positions? What would you consider to be the extent of the "investment functions" of the Board?

QUESTION NO. 2:

After a fiduciary is selected and a contract is consummated, to what extent is the Board responsible for the approval or disapproval of any changes in the portfolio? And, must all transactions be made by the fiduciary or may the Board execute orders or make commitments without reference to or consultation with the fiduciary?

ANSWERS:

The answers to the above-stated questions are set forth in the opinion.

OPINION:

In a previous opinion rendered by this office under date of September 20, 1966, we held that the Board of Trustees may not employ a fiduciary for the *full* management of the investment functions of the System. This conclusion was largely dictated by an interpretation of the statutory language then in effect set forth in 5 M.R.S.A. § 1061 (1) which defined the investment powers of the Board.

The language of 5 M.R.S.A. § 1061 (1) prior to amendment read in part as follows:

> "1. Duties of board of trustees. The members of the board of trustees shall be the trustees of the several funds created by this chapter *and shall have full power to invest and reinvest such funds,* subject to all of the terms, conditions, limitations and restrictions imposed by the laws of this State upon savings banks in the making and disposing of their investments; and subject to like terms, conditions, limitations and restrictions, *said trustees shall have full power to hold, purchase, sell, assign, transfer and dispose of any of the securities and investments in which any of the funds created by this chapter shall have been invested, as well as the proceeds of such investments. . . .* " (Emphasis supplied.)

Prior to the recently enacted amendments it was clear that the Board had the full power of investment of funds although said Board was given the authority to employ investment counsel or advice as an aid in carrying out its functions. Prior to amendment, 5 M.R.S.A. § 1031 (15) read as follows:

> "Investment and other counsel. The board of trustees shall employ investment counsel or advice and may employ or engage such other expert, professional or other assistance as may be necessary or appropriate to aid in carrying out its functions."

Prior to the recently enacted amendments we believe that it was quite clear that the power of investment was to be exercised solely by the trustees, although said trustees could employ agents to assist in the investment function. We set forth the above-quoted statutory language so that it may be compared with the language of the recently enacted law relative to investment of funds. Clearly the legislature has enacted sweeping changes in regard to the investment of trust funds of the System and the statutory language of the amendments now constitute the terms of the trust and delineates the powers and the duties of the trustees of said trust.

5 M.R.S.A. § 1031 (15) now reads in part as follows:

> "Investment and other counsel. *The board of trustees shall employ a bank fiduciary* located in New England or New York City and may employ other investment counsel or advice and other expert professional or other assistance as may be necessary or appropriate to aid in carrying out its functions.
>
> *"The board shall have the power to enter into a contract with the bank*

fiduciary to carry out the investment functions of the board. Under the terms of the contract the bank fiduciary may be authorized to have custody of all or any of the assets belonging to any fund of the retirement system and to invest and reinvest the funds of the retirement system in its discretion within the framework of the general investment policy of the board of trustees. The board shall receive reports of the investments and any changes therein effected by the bank at least quarterly. . . ." (Emphasis supplied.)

In order to promote prudent investment and the application of expert knowledge in the field of investment, the legislature has declared that the Board shall employ the services of a bank fiduciary as an agent in carrying out its investment functions. The legislature has in effect provided that the Board may delegate its authority to invest funds to an agent, a bank fiduciary, subject to certain limitations.

We would answer the first question submitted by saying that the Board is still vested with the over-all authority of investment of funds and that the Board may describe in detail to its agent, the bank fiduciary, the type of investment which shall be made.

The extent of the investment functions of the Board cannot be delineated with any degree of specificity. The investment functions of the Board would depend to a large extent upon the terms of the contract consummated between the Board as principal and the bank as agent. Whatever contractual language is used, it is clear that the general investment policy of the Board must at all times be carried out. Failure to do so on behalf of the bank would constitute grounds for the Board to amend or repudiate its investment contract.

The recently enacted language of 5 M.R.S.A. §1061 (1) reads in part as follows:

"1. Duties of board of trustees. The members of the board of trustees shall be the trustees of the several funds created by this chapter and *shall be authorized to cause such funds to be invested and reinvested by a bank fiduciary in accordance with the prudent man rule subject to periodic approval of the bank's investment program by the trustees.*"

5 M.R.S.A. §1031 (15) quoted above provides "that the Board shall receive reports of the investments and any changes therein effected by the bank at least quarterly."

In answer to the second question, the statutory language does not spell out the method or frequency of approval which the Board must exercise over the bank's investment activities. Again, the time or method of approval or disapproval of the bank's investment practices is a matter which may be specified in the contract consummated between the Board and the bank.

In general a principal may dictate the terms of his agent's authority. Here however the legislature has limited somewhat the power of the principal to determine the limits of the agent's authority. In other words, the legislature has clearly stated that the agent, the bank fiduciary, may exercise discretion in the investment of funds providing the general investment policy of the principal is carried out. When a bank fiduciary invests in accordance with the prudent man rule and in a manner consistent with the over-all policy of the Board, it is surely unnecessary that every individual act of investment by the fiduciary agent be given approval by the Board.

Once a contract is consummated between the Board and the bank fiduciary, we believe that the legislature intended that the bank fiduciary should carry out the actual investment transactions, subject at all times to the terms of its contract with the Board.

The Board may not change the terms of its contract with the fiduciary or in any manner alter its investment policy without manifesting such intention to the fiduciary.

In summary, we believe that the Legislature has determined that the Board of Trustees may more effectively invest Retirement System funds through the employment

of a bank fiduciary. When a bank fiduciary is employed however, we do not believe that the legislature intended the Board to have a complete veto power over the day-to-day investment activities of its fiduciary employee. Furthermore, to allow the Board to execute orders or change investment policy without prior notification to its fiduciary agent could render the latter powerless to perform any useful service in regard to the investment of funds. This, we are certain, the Legislature did not intend as a consequence of the above-quoted statutory enactments.

PHILLIP M. KILMISTER
Assistant Attorney General

August 3, 1967
Indian Affairs

Edward C. Hinckley, Commissioner

Rights of Maine Indians Residing on Tribal Reservations to Hold State Elective Offices.

FACTS:

By memo you have requested information concerning rights of Maine Indians residing on any of the three tribal reservations in Maine to hold State elective offices.

QUESTION:

May a Maine Indian residing on one of the three tribal reservations in Maine run for any or all county and/or State elective offices, and if elected, serve?

ANSWER:

Yes, as qualified by the opinion.

OPINION:

The qualification for membership in the Maine State House of Representatives reads as follows:

> "No person shall be a member of the House of Representatives, unless he shall, at the commencement of the period for which he is elected, have been five years a citizen of the United States, have arrived at the age of twenty-one years, have been a resident of this State one year; and for the three months next preceding the time of his election shall have been, and, during the period for which he is elected, shall continue to be a resident in the town or district which he represents." Art. IV, Part First, § 4, *Constitution of the State of Maine.*

A Maine Indian residing on a Maine tribal reservation is a citizen of the United States. We assume, for purposes of this opinion, that the Indian citizen is 21 years of age and has been a resident of this State for one year.

Upon the effective date of the 1967 Private and Special Laws, c. 137 (L.D. 1720), Indian voting districts will be placed within representative class districts. For purposes of this opinion, we assume that in the 1968 elections the Indian citizen who runs for elective office shall have been a resident of the representative class district for three months next preceding the election day and shall continue to be a resident of such a

district if he is elected. Thus, a Maine Indian residing on a tribal reservation can meet all of the Constitutional requirements for qualifications as a member of the State House of Representatives and if elected by other electors in his representative class district, can serve in the State House of Representatives.

Article IV, Part Second, § 5 of the Constitution of the State of Maine sets forth the qualifications for service in the Maine Senate and reads as follows:

> "The Senators shall be twenty-five years of age at the commencement of the term, for which they are elected, and in all other respects their qualifications shall be the same as those of the Representatives."

Thus, any Maine Indian who is 25 years of age and meets the qualifications for membership as a State Representative can hold the office of State Senator if elected by his fellow electors.

30 M.R.S.A. § 101 sets forth the qualifications for holding the office of county commissioner. 20 M.R.S.A. § 601 sets forth the qualifications for holding the office of county treasurer. 30 M.R.S.A. § 901 sets forth the qualifications for county sheriff. Maine Indians residing on tribal reservations if elected by their fellow electors can serve in any of these capacities as they meet the requirements of these sections.

30 M.R.S.A. § 451 sets forth the qualifications for county attorney. If a Maine Indian residing on a tribal reservation is an attorney at law admitted to the general practice of law, he can meet the residence and professional qualifications for the office and if elected by his fellow electors in the county, he may serve in this capacity.

We have not answered any inquiry concerning the rights of an Indian citizen on tribal reservations to hold office as a result of the 1966 general elections as this is moot.

JEROME S. MATUS
Assistant Attorney General

August 15, 1967
Bureau of Purchases

J. R. Dyer, State Purchasing Agent

Power of Legislature to authorize Clerk of the House of Representatives to make direct purchases without complying with Bureau of Purchases – Me. Rev. State. Ann., tit. 3, § 42 (1964) and Me. Rev. Stat. Ann., tit. 5, § § 1811 – 1820 (1964).

FACTS:

On January 4, 1967 the Maine House of Representatives passed the following order:

> "ORDERED, that the Clerk of the House be authorized to purchase such stationery, office supplies and equipment as may be needed to carry on the business of the House."

QUESTION:

Does the House Order above quoted confer upon the Clerk of the House authority to make the purchases therein mentioned without complying with the procedures of the State Bureau of Purchases?

OPINION:

The Department of Finance and Administration, through the Bureau of Purchases,

has the authority to purchase all supplies, materials and equipment required by the State Government. Me. Rev. Stat. Ann., Tit. 5, § 1811 (1964). The State Purchasing Agent is directed by statute to purchase or contract for all supplies, materials and equipment needed by the State Government, with certain exceptions not here pertinent. Me. Rev. Stat. Ann., Title 5, § 1812 (1964). The State Purchasing Agent, with the approval of the Commissioner of Finance and Administration, may, within limitations, adopt rules authorizing any state department or agency to purchase certain specified supplies, materials or equipment directly. Me. Rev. Stat. Ann., tit. 5, § 1813, par. 1, (1964). Otherwise, such supplies must be purchased by, or furnished to, the State Government only upon requisition to the State Purchasing Agent. Me. Rev. Stat. Ann., tit. 5,§1815 (1964).

Me. Rev. Stat. Ann., tit. 3, § 42 (1964) dealing with the duties of the Clerk of the House, in pertinent part provides:

> "He shall when the Legislature is not in session be the chief executive officer of the Legislature, and unless the Legislature otherwise orders, . . . arrange for necessary supplies and equipment through the State Bureau of Purchases. . ."

The language ". . . unless the Legislature otherwise orders. . ." cannot reasonably be interpreted to mean that the Legislature can, by order, give the Clerk of the House authority to circumvent the clear intent of Me. Rev. Stat. Ann., tit. 5, § § 1811-1820 (1964) to channel all state buying through the Bureau of Purchases. We interpret this language to mean that the Legislature may by order assign the duty of arranging for necessary supplies and equipment through the Bureau of Purchases to someone other than the Clerk.

We conclude that the House Order of January 4, 1967 was a nullity insofar as it purported to confer authority upon the Clerk of the House to contract for or purchase supplies and materials independently of the Bureau of Purchases and the State Purchasing Agent.

ROBERT G. FULLER, JR.
Assistant Attorney General

August 17, 1967
Parks and Recreation Comm.

Fred M. Bartlett

Election of Municipal Park and Conservation Commissioners.

FACTS:

30 M.R.S.A. § 3851 was amended by the Public Laws of 1965, c. 203, § 2 to read in part as follows:

> "Cities and towns *Municipalities* may establish park and conservation commissions and choose by ballot 3 5 park and conservation commissioners, * * * and after the first year choose annually a commissioner for 3 5 years * * *."

QUESTION:

What body of a municipality may "choose by ballot" and "choose annually" these park and conservation commissioners?

ANSWER:

Towns – by qualified voters at a town meeting.
Cities – by the city council.

OPINION:

30 M.R.S.A. § 3801 relates to devises and gifts for open areas, public parks and playgrounds and was amended by the 1965 Public Laws, c. 203, § 1, to read as follows:

> "Any town *municipality,* as such, may receive, hold and manage devises, bequests or gifts for the establishment, increase or maintenance of public parks and playgrounds *and open areas, including marsh lands, swamps and other wet lands,* in such town *municipality,* and may accept by vote of the legal voters *legislative body* thereof any land in such town *municipality* to be used as a public park or playground or both combined, *or maintained as an open area and as marsh land, swamp or wet land as defined in section 3851.* When any plantation is incorporated into a town, such gifts and the proceeds thereof fully vest in such town."

It is to be noted that in the above section that the term "legal voters" was replaced by the term "legislative body" and the term "town" was replaced by the term "municipality". It is to be further noted that 30 M.R.S.A. § 3851, as amended (the section being interpreted here) replaces the term "cities and towns" by the term "municipality". We interpret the words "choose by ballot" to mean choose by ballot of a legislative body of a municipality as in 30 M.R.S.A. § 3801, as amended.

A legislative body is defined as any body of persons authorized to make laws or rules for the community represented by them. It is one capable of or pertaining to the enactment of laws. *Burke v. Wood,* 162 F. 533 at 536. The legislative body of a town is the qualified voters of a town voting at a town meeting. 30 M.R.S.A. § 2054 (1) provides that:

> "1. Qualified voter. Each person qualified to vote for Governor in the town in which he resides may vote in the election of all town officials *and in all town affairs."* (Emphasis supplied.)

The legislative body of a city is usually its city council. The Maine Housing Authority Act defines a governing body as follows:

> "Governing body. 'Governing body' shall mean the city council or other legislative body charged with governing a city." *30 M.R.S.A. § 4552 (6).*

Hence, it is our opinion that it is the legislative body of a municipality that chooses by ballot the park and conservation commissioners and chooses an annual replacement each year. It is also our opinion that the legislative body of a town is the qualified voters voting at a town meeting, and the legislative body of a city is its city council.

JEROME S. MATUS
Assistant Attorney General

August 31, 1967
Maine State Retirement System

E. L. Walter, Executive Secretary

Acceptance of funds by Maine State Retirement System from estate of deceased member or from third person for credit to decedent's account; Me. Rev. Stat. Ann., Tit. 5, ch. 101 (1964).

FACTS:

An individual entered into the service of the State of Maine as a game warden on June 3, 1946 and served therein in such capacity continuously until his death on July 14, 1967. However, he did not become a member of the Maine State Retirement System until September 29, 1946. In the early part of this year he purchased credit for four of his years of military service, the maximum creditable. Me. Rev. Stat. Ann., Tit. 5, § 1094, par. 13 (Supp. 1966). At his death he had a total of 24 years and 9 months' service credited for purposes of the Maine State Retirement System.

It is undisputed that if the decedent, during his lifetime, had paid into the Retirement System his contributions for those three months in 1946 when he was an employee of the State but not a System member, he would have been credited with the 25 years of service necessary to render his wife eligible for these benefits. The wife was advised by a State official during decedent's lifetime that decedent "would not have 25 years of service unless the 4 years of military service was paid for." Letter of Hazel C. Foster, Retirement Claims Supervisor, dated August 14, 1967, on file in the Office of the Maine State Retirement System. The official admits that in advising the wife on survivor benefits, the unpaid-for three months of service were overlooked and that all parties believed that, upon payment to the State for the four years of military service, decedent had 25 years of creditable service. *Ibid.*

Since decedent had not 25 years credited service, his widow's benefits are governed by Me. Rev. Stat. Ann., Tit. 5, § 1124, par. 1 (1964). These benefits are substantially less than those accruing under § 1124, pars. 2 and 3 to widows of members *with* 25 years credited service.

The widow feels that she "was led to believe that payment had been made in full to secure all retirement benefits." Letter of Alan C. Pease, Esquire, dated August 7, 1967, on file in the office of the Maine State Retirement System. She feels that she should be permitted to pay in her late husband's contributions for the three months he was not a member of the system and thus obtain the greater benefits.

QUESTION:

May the Maine State Retirement System, after the death of a member, accept funds from the decedent's estate or from some living person for credit to the decedent's account?

OPINION:

Yes, in certain limited circumstances.

In computing creditable service, the Maine State Retirement System Act, Me. Rev. Stat. Ann., Tit. 5, ch. 101 (1964) specifies that contributions must be made by "members." See, e.g., Me. Rev. Stat. Ann., Tit. 5, § 1094, par. 13 (Supp. 1966) – "The *member* shall contribute to the retirement system for each year of military service claimed. . . ." (Emphasis added) Me. Rev. Stat. Ann., Tit. 5, § 1094, par. 9 (1964) – "Any *member*. . . may . . . pay into the Member's Contribution Fund. . . ." (Emphasis added). Membership ceases at death. Me. Rev. Stat. Ann., Tit. 5, § 1091, par. 6 (1964). We find no statutory authority to permit the Board to accept contributions of the type proposed to be made in the case presented; nor do we find any prohibitions *in these circumstances.*

There remains the issue of whether the System, as an agency of the State, is estopped

from denying that the decedent had 25 years credited service as a result of the conduct of the Retirement Claims Supervisor. Research indicates that the System is not so estopped.

Equitable estoppel is ordinarily not available against a public agency functioning in its governmental capacity, a situation which reflects the ancient theory of sovereign immunity. See C.J.S., *Estoppel* § 138 and cases there cited. The doctrine may be invoked only where there has been a false and material misrepresentation by the public agency sought to be charged which caused the invocator to change his position or to fail to assert some right which he otherwise would have asserted. *Inhabitants of Town of Andover v. McAllister,* 119 Me. 153, 109 A. 750 (1920). We see no such conduct on the part of the Retirement Claims Supervisor here.

In a somewhat similar factual situation in *City of Chicago v. Miller,* 27 Ill. App. 2d 211, 188 N.E.2d 694 (1963), Miller went to City Hall in Chicago to see if his building met city fire code standards. A faceless clerk checked the records and told Miller his building was satisfactory. Miller did not bother to check the code himself or his building. Shortly thereafter the City brought mandamus to compel him to correct numerous fire code violations at heavy expense. *Held,* city not estopped by clerk's conduct from bringing the writ.

We conclude that while there is not question of estoppel which would force the State Retirement System trustees to accept funds offered under these circumstances by the widow, and while we find neither statutory authority to permit the acceptance nor any statutory bar to the acceptance, the matter is a discretionary one with the State Retirement System trustees. Clearly, the decedent could have made the payments himself and equally clearly thought he had made all necessary payments to bring his credit to the maximum. The law will not be violated if the payments offered by the widow are accepted at this time under these circumstances.

One final word with respect to precedent. It is the opinion of this Department that this particular opinion is based upon these particular facts and must not be used as a precedent with respect to future policy. The discretionary powers of the trustees of the State Retirement System will govern in every case. If every case is judged on the facts presented, then justice and equity will certainly be served. The question presented on this entire fact situation is no longer a question of law. It remains for those charged with the authority to determine whether or not a strict legalistic interpretation in these circumstances will work an injustice upon the survivors of a State employee who apparently was led to believe that his benefits had been fully purchased and processed.

ROBERT G. FULLER, JR.
Assistant Attorney General

September 1, 1967
Banks and Banking

Philip R. Gingrow, Director

Collection Agency Regulations.

FACTS:

A regulation has been proposed to permit collection agencies to charge an office fee or service fee to debtors.

QUESTION:

Would such a regulation be permitted under the provisions of 32 M.R.S.A. §§ 571-583, inclusive (chapter 10, The Collection Agency Act) as enacted by P. L. 1965, c. 430?

ANSWER:

No.

OPINION:

32 M.R.S.A. § 582 provides in pertinent part:

> "The commissioner may make such reasonable rules and regulations, not inconsistent with this chapter, pertaining to the operation of the business of licensees as he may deem necessary to safeguard the interest of the public. * * *"

Thus a rule and regulation relating to Chapter 10 of Title 32, i.e., the collection agency act, must meet three criterion:

1. It must not be inconsistent with 32 M.R.S.A. c. 10;
2. It must pertain to the operation of the business of licensees; and
3. The commissioner must deem the regulation as necessary to safeguard the interests of the public.

The proposed regulation meets the second criteria. We shall not decide whether or not the third criteria is met for it is the commissioner who must make the determination whether or not a regulation is necessary to safeguard the interests of the public. We do conclude, however, that the proposed regulation does not meet the first criteria. The proposed regulation is inconsistent with the following language of 32 M.R.S.A. § 576:

> "No collection agency shall: * * * collect or attempt to collect from any person an amount in excess of the amount legally due the creditor."

In our opinion the making of a service charge or office fee would be an attempt to collect an amount in excess of the amount legally due the creditor, and the collection of the service charge or office fee would be the collection of an amount in excess of the amount legally due the creditor.

There is added justification for our opinion that the proposed regulation is invalid inasmuch as the 103rd Legislature specifically refused to amend the prohibited practices set forth in 32 M.R.S.A. § 576 by refusing to strike out the words "collect or attempt to collect from any person an amount in excess of the amount legally due the creditor" and refusing to replace those words with the words "collect or attempt to collect from any person an amount in excess of that submitted by the creditor for collection, except a service charge of not more than $2." See *L.D. No. 136* of the 103rd Legislature.

The promulgation of the proposed regulation would be legislating by regulation in clear contradiction to legislative intent and is clearly outside the scope of the commissioner's authority.

JEROME S. MATUS
Assistant Attorney General

September 1, 1967
Banks and Banking Insurance

David Garceau, Commissioner
Harold E. Trahey, Acting Commissioner — Insurance

Regulation relating to overcharges of insurance premiums in conjunction with small loans.

FACTS:

A request has been made to the Bank Commissioner and/or the Acting Insurance Commissioner to promulgate a regulation which would set forth the manner of handling small amounts of inadvertent overcharges of insurance premiums in respect to insurance coverages in connection with small loans.

QUESTION:

May the Bank Commissioner and/or the Acting Insurance Commissioner promulgate such a regulation?

ANSWER:

No.

OPINION:

9 M.R.S.A. § 3082 was amended by P. L. 1967, c. 473, § 4 to read in pertinent part as follows:

> ". . . If interest or charges in excess of those permitted by this section and section 3081, *including insurance premiums and filing fees,* shall be charged, contracted for or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest or charges whatsoever. *Upon a finding by the District or Superior Court that interest or charges in excess of those permitted by this section and section 3081 have been charged, contracted for or received, the licensee shall forfeit to the borrower the amount of all payments made as principal and interest payments, and he shall mark and return the note and other papers as provided in section 3083, subsection 3. Reasonable attorneys' fees and costs shall be awarded to the borrower if he is the prevailing party in such action. Each licensee shall annually report to the Commissioner of Banks and Banking the amount of insurance sold, premiums charged therefor, and claims paid on a form prescribed by the commissioner and a summary of these reports will be included in the annual report of the commissioner."*

The language of 9 M.R.S.A. § 3082 as amended clearly prohibits overcharges of insurance premiums. The statute makes no distinction between intentional and inadvertent overcharges. It also places upon our Judicial System the responsibility of making a finding as to overcharges and the voiding of payments. For either the Bank Commissioner or the Acting Insurance Commissioner to promulgate a regulation dealing with insurance premium overcharges in conjunction with small loans would be in clear contradition to the statute. The promulgation of such a regulation is clearly outside the

authority of the Bank Commissioner or the Acting Insurance Commissioner and if promulgated, would have no legal effect.

JEROME S. MATUS
Assistant Attorney General

September 1, 1967
Banks and Banking Insurance

Philip Gingrow, Director
Harold Trahey, Acting Commissioner — Insurance

Interpretation of Accident and Health Insurance Provision of an Act Revising Laws Relating to Licensed Small Loan Agencies.

FACTS:

The 103rd Legislature enacted P. L. 1967, c. 473, An Act Revising Laws Relating to Small Loan Agencies. The Act amended 9 M.R.S.A. § 3082 by including the following prohibition in relation to the sale of accident and health policies in conjunction with small loans:

> "No accident and health insurance shall be sold unless there is a waiting period of 30 days or more, a minimum payment of $40 per month and the loan must be for at least 18 months."

QUESTION:

May an accident and health insurance policy sold in conjunction with a small loan be written with a 30-day waiting period under a retroactive plan?

ANSWER:

No.

OPINION:

An accident and health insurance policy with a 30-day waiting period without a retroactive plan would provide for payments for accident or sickness from the 31st day of the accident or sickness.

An accident and health policy with a 30-day waiting period and a retroactive plan (for purposes of illustration a 30-day retroactive plan) would provide for payments of indemnification for accident or sickness from the initial day of the accident or sickness provided the accident or sickness was over 30 days in duration. Under both plans (the 30-day waiting period without the retroactive plan and the 30-day waiting period with the retroactive plan), there would be no indemnification payments if the accident or sickness was 30 days or less in duration.

If the reference language amending 9 M.R.S.A. § 3082 amended a section of Title 24 of the Maine Revised Statutes Annotated (the insurance title) rather than 9 M.R.S.A. (the banking title), we might conclude that a 30-day waiting period with a retroactive plan could be written. Under present State of Maine insurance regulations waiting periods with retroactive plans are permitted. However, in interpreting the language of the

legislature in permitting accident and health insurance on small loans, we must recognize that the legislature intended to permit the sale of accident and health policies in conjunction with small loans to be sold only under limited circumstances – that is, the loan must have a minimum payment of at least $40 per month, the loan had to extend for a period of at least 18 months, and the loan must have a waiting period of at least 30 days. It should be further recognized that a retroactive plan would result in a higher premium because of the greater benefits, and it is our judgment that the legislature intended the more limited coverage with the corresponding lower premium. It is our further judgment that in interpreting the meaning of the words "waiting period of 30 days or more" that we cannot give the broad technical insurance meaning of "waiting period" which meaning would include retroactive and non-retroactive plans. We believe that the legislature in restricting the sale of accident and health policies in conjunction with small loans would follow a dictionary definition of "waiting period" which reads as follows:

> "waiting period – insurance – in certain forms of insurance, as accident and health & workmen's compensation insurance, a stated period after the beginning of disability during which no benefits are paid." *Websters New International Dictionary, 2d Edition, p. 2865.*

which definition would not contemplate a retroactive plan. It is, therefore, our opinion that a waiting period with a retroactive plan is not permitted by 9 M.R.S.A. § 3082.

JEROME S. MATUS
Assistant Attorney General

September 12, 1967
Agriculture

Harold E. Bryant, Ex. Vice President
Maine Potato Council
Licensing and Controlling of Processing Grade Potatoes

FACTS:

The Commissioner of Agriculture has established a Maine processing grade for potatoes. These potatoes were meant to be used exclusively for processing. However, some have reached the fresh vegetable market. The Maine Potato Council would like to prevent this by requiring growers and shippers to be licensed by the Commissioner of Agriculture to ship this grade and thereby be able to control the use of these potatoes.

QUESTION:

Whether the Commissioner of Agriculture or the Maine Potato Commission can, under present Maine Law, employ a licensing device to make sure that processing grade potatoes are used exclusively for processing purposes?

ANSWER:

No.

OPINION:

The powers of the Commissioner of Agriculture are limited by the statutes of the State of Maine. The general rule as relates to administrative agencies is stated in 1 Am. Jur. 2nd 72:

> "The powers of administrative agencies are measured and limited by the statutes or acts creating them or granting their powers, to those conferred expressly or by necessary or fair implication."

The Commissioner of Agriculture derives his powers in regard to official grades and standards from 7 M.R.S.A. § 441 through 447 and section 950 through 957. These sections prescribe the methods by which he establishes and promulgates the grades and standards and limits his powers thereto. It was under the former sections, namely 441 through 447 that the Blue, White and Red state trade marks were adopted some years ago. These statutes give the Commissioner no authority to control the parties to whom processing potatoes may be sold; this would be the effect of the licensing and controlling which you have described.

Under 10 M.R.S.A. § 1605 the Commissioner may delegate to the Maine Potato Commission the authority to regulate the use of the State of Maine trade mark; under sections 1602 and 1606 the Commission derives its power to prescribe rules and regulations for carrying out the purposes of the chapter and the issuance of licenses thereunder.

This is not to say, however, that the Maine Potato Commission can use the licensing process for restricting the use to which the potatoes can be put. Establishing a grade for identification is one thing. Restricting sales is another.

We are therefore of the opinion that the controls as to usage about which you inquired can not be utilized by the Commissioner of Agriculture or the Maine Potato Commission to confine this grade to the purposes for which it was established. It would appear that new legislation would be needed to effectuate this end.

WARREN E. WINSLOW, JR.
Assistant Attorney General

September 20, 1967

Samuel S. Silsby, Jr., State Archivist

Clarification of Jurisdiction of Maine State Cultural Building Authority

FACTS:

The Maine State Cultural Building Authority is authorized under Private and Special Laws, 1965, Chapter 259, "to acquire land and construct a building thereon to provide appropriate facilities for housing the Maine State Archives, Maine State Library, and Maine State Museum, with service approaches, parking facilities, equipment, exhibits and furnishings therefor, at costs not exceeding $4,800,000."

The site selected by the Authority for the construction of the building includes land previously owned by the State and private lands acquired under orders of taking adopted by the Governor and Council on March 29, 1967. Title to the land within the site area selected by the Authority is now in the State of Maine.

The Maine State Cultural Building Authority has been advised of the authority of the Bureau of Public Improvements relative to the approval of the construction plans for the

Cultural Building. *5 M.R.S.A. § 1741, et seq.* A question has arisen as to the authority of the Bureau over the choice of the already selected site by the Authority.

QUESTION No. 1:

Must the Bureau of Public Improvements grant its approval of the site already selected by the Authority as a condition precedent to the validity of said selection by the Authority?

QUESTION NO. 2:

Whether the Bureau of Public Improvements may legally condition its approval of the plans of the Cultural Building upon the Bureau's acceptability of the site already selected by the Authority?

ANSWERS:

1. No.
2. No.

REASONS:

The provisions of P. & S. 1965, c. 259, § 1 creating the Maine State Cultural Building Authority vest in that State agency the authority to acquire land and to construct a Cultural Building facility together with appropriate service approaches, parking facilities, equipment, exhibits, and furnishings. Nothing in the reference measure authorizes the Bureau of Public Improvements to exercise approval of the site as a condition precedent to the Authority's selection of the site. There is no indication whatsoever from a reading of the Authority's legislative mandate that some other State agency exercise a right of approval regarding the acquisition of the land upon which the Cultural Building is to be rested. Too, nothing appearing in 5 M.R.S.A. § 1741, et seq. authorizes the Bureau of Public Improvements to approve of the site selected by the Maine State Cultural Building Authority. The powers and duties of the Bureau of Public Improvements in the Department of Finance and Administration are set forth in § 1742 of Title 5 of the Maine Revised Statutes. Nothing there curtails the authority vested in Chapter 259 of the Private and Special Laws of 1965.

JAMES S. ERWIN
Attorney General

September 20, 1967
Maine Cultural Building Authority

Samuel S. Silsby, Jr., State Archivist

Definition of Jurisdiction of Capitol Planning Commission.

FACTS:

The 103rd Legislature enacted P.L. 1967, c. 458 for the purpose of creating a Capitol Planning Commission. The measure will become effective October 7, 1967. When

effective, the subject legislation will appear in a new chapter in Title 5 of the Maine Revised Statutes, i.e., 5 M.R.S.A. § 297, et seq.

The Legislature, in enacting the declaration of policy re the Commission, has decreed that the Commission shall develop the "Capitol Area" with "economy, careful planning, aesthetic consideration, and with due regard to the public interests involved." *P.L. 1967, c. 458, § 1.* The duties of the Commission are set forth in the proposed section 299; which duties require the Commission to prepare a master plan for the orderly development of future state buildings and grounds in the Capitol Area of the City of Augusta; and to "submit the completed plan to the Legislature for adoption as the official state master plan for the development of state buildings and grounds in the Capitol Area." (See 5 M.R.S.A. § 302, as enacted in P.L. 1967, c. 458.) Section 304 of the new Chapter 14 of Title 5 re the Capitol Planning Commission provides that no construction project shall be initiated in the Capitol Area for the development of state buildings and grounds "following the adoption of the plan by the legislature without the approval of the commission of the proposals and plans for such projects."

Private and Special Laws of 1965, c. 259 was enacted by the Maine Legislature for the purpose of creating the Maine State Cultural Building Authority. In that piece of legislation, the lawmakers determined that said Authority was to be an agency of the State of Maine for the purpose of acquiring land and for the companion purpose of constructing a building thereon to house the Maine State Archives, the Maine State Library, and the Maine State Museum. Pursuant to Chapter 259 of the aforementioned Private and Special Laws of 1965, the Authority, at an organizational meeting held January 17, 1967, voted favorably upon a site for the Cultural Building facility, to wit:

> "VOTED: That the site south of the State House, west of State Street, north of Kennedy Brook, and east of Jackson Street be selected as the site for the Cultural Building."

It was also voted at the same meeting that the Chairman of the Maine State Cultural Building Authority be authorized to proceed with the acquisition of the property denominated in the above vote. Thus, properties within the reference site area were acquired by the Authority on the basis of orders of taking of the Governor and Executive Council passed on March 29, 1967. The matter of the amount of damages to be paid by the Authority was decided by the Authority on September 7, 1967 according to an award made by the County Commissioners of Kennebec County on September 5, 1967. Architectural plans for the construction of the building on the selected site were completed on June 2, 1967 by the architectural firm selected by the Authority. (A time schedule re the construction of the Cultural Building has been established so as to realize the completion of the building as a focal point for the State's Sesquicentennial Celebration during 1970.)

The relationship and authority of the Capitol Planning Commission, established as aforesaid, to the Maine State Cultural Building Authority is of concern to the Authority in view of the present status of the development of the Cultural Building. The Authority wishes to receive clarification as to the responsibilities of these two respective State agencies regarding the proposed construction of the Cultural Building.

QUESTION:

Whether the Capitol Planning Commission created by P. L. 1967, c. 458, is authorized to exercise jurisdiction regarding the site selected by the Maine State Cultural Building Authority so as to control the placement of the Cultural Building already initiated by the Authority?

ANSWER:

No.

REASON:

The Maine State Cultural Building Authority was created by legislation which has become effective prior to the creation of the Capitol Planning Commission. In fact, the latter Commission is not effective at this writing and will not become effective until October 7, 1967. The master plan to be created by the Capitol Planning Commission will not become effective until adopted by the Maine Legislature. It is clear that the Capitol Planning Commission is vested with the authority to prepare the subject master plan; and to present the same to the Legislature for adoption. Until such adoption occurs, the Capitol Planning Commission cannot utilize the mandate in Section 304 of Title 5, i.e., approve proposed plans for State buildings in the Capitol Area. At the same time, the provisions of the Act creating the Maine State Cultural Building Authority vests that agency with jurisdiction to acquire land for the purpose of constructing a Cultural Building facility. *P. & S. 1965, c. 259, § 1, et seq.*

JAMES S. ERWIN
Attorney General

September 21, 1967
Bureau of the Budget

R. M. Berry, State Budget Office

Longevity Pay for State Employees

FACTS:

The 103rd Legislature enacted Chapters 490 and 494 of the Public Laws of 1967 authorizing the fixing of salaries of certain State executive officers from the Governor and Executive Council determination to an annual statutory amount computed on the basis of 52 times their respective current weekly salaries. With regard to the effect of those chapters in view of the Private and Special Laws of 1963, Chapter 202, and the subsequent enactment of Chapter 483 of the Public Laws of 1965, you have asked for an opinion on five (5) questions.

QUESTION NO. 1:

When the statutory salary of this State executive officer, and the other six of the same category (step 2) becomes effective on October 7, 1967, are all 7 entitled to an additional 10% of the amount specified in the new statute?

ANSWER NO. 1:

No.

OPINION:

The law of 1967 does not permit such an increase. In the absence of any contrary provisions, all laws are to commence in futuro and act prospectively and the presumption is that all laws are prospective and not retrospective, *Bowmen v. Geyer* 127 Me. 351. As their current weekly salaries reflect the step 2 longevity increases and the statute fixes their salaries precisely, there is no basis for an additional increase.

QUESTION NO. 2:

Or will they be entitled to an additional 10.25% of the amount specified in the new statute?

ANSWER NO. 2:

No.

OPINION NO. 2:

Their present weekly salaries reflect the proper longevity increases. In the absence of legislation to authorize such an increase, they are not to so benefit again.

QUESTION NO. 3:

When the State executive officer, whose currently weekly salary includes one 5% longevity step, begins receiving his annual statutory salary on October 8, 1967, will he be entitled to an additional 5% (one longevity step) under the new law?

ANSWER NO. 3:

No.

OPINION NO. 3:

The law of 1963 requires that the second longevity step be effective when service has been for 15 years and the last 8 are continuous – for all groups. The laws of 1965 and 1967 as stated in opinion NO. 2 and NO. 3 do not change this.

QUESTION NO. 4:

Should the current statutory salaried State executive officers, entitled to two longevity steps, be adding 10.25% to their annual statutory salaries instead of the 10% they are now receiving?

ANSWER NO. 4:

No.

OPINION NO. 4:

While the law of 1965 states that this group ". . . shall receive longevity pay to commence at the same time as, and continue *under the same terms and conditions as...*,"

those of the 1963 law (emphasis supplied), it is my understanding that the increases for the group, while approximating 10.25% in some cases, were rarely exactly 10.25%. Similarly, the rate of increase for the statutory salaried State executive officers approximates those rates of increase of the 1963 law. Consequently it appears that these employees are being paid consistently with the terms and conditions of the 1963 law; and as the law of 1967 does not authorize an increase for the statutory salaried State executive officers, an increase cannot now be made.

QUESTION NO. 5:

If the answer to Question NO. 4 is "yes", are these officers entitled to a retroactive longevity pay adjustment back to the time they became eligible for their second longevity step?

ANSWER NO. 5:

The answer to NO. 4 was "no".

GARTH K. CHANDLER
Assistant Attorney General

September 26, 1967
Maine Milk Commission

Walter B. Steele, Jr.
Executive Secretary

H. P. Hood & Sons Premium Offer; 7 M.R.S.A. § 2954

FACTS:

On September 7, 1967, this office issued an opinion concerning a proposed premium offer to be printed on quart and half-gallon cartons of milk to be sold at retail stores in this State. In that opinion, it was determined that the reference offer violated the provisions of 7 M.R.S.A. § 2954, i.e., that the offer was destructive of the schedule of minimum prices for milk established by the Maine Milk Commission. The contents of our September 7, 1967 opinion are incorporated herein.

On September 21, 1967, officials of H. P. Hood & Sons met with the Executive Secretary of the Maine Milk Commission and with attorneys in this office. At that time, a general discussion was had of the reference opinion and of certain changes in the offer which had been made by the milk firm since the issuance of our opinion.

As the matter now stands, H. P. Hood & Sons intends to exclude, from both the front and rear sections of the cartons, the "burst reading" containing the words "SPECIAL OFFER! SEE SIDE PANEL". Thus, the quart and half-gallon milk cartons will thereafter contain the following references regarding the premium offer (the description of the item is omitted here, as not being material):

> "PREMIUM OFFER NO. 1"; "HOOD'S EXCITING PREMIUM PROGRAM OF USEFUL ITEMS. . . "; "NOW. . . A continuing series of offers exclusive on Hood milk cartons!" and "This is the *first offer* – watch for the second offer soon!"

H. P. Hood & Sons proposes to make this offer available to the general public in the

State of Maine during the months of November and December, 1967 and January, 1968. The language on the cartons provides that the offer will expire on April 30, 1968, in order "to allow the general public a reasonable time in which to accept the offer." (Quoting from a letter dated September 22, 1967 by Lawrence W. Sullivan, Esquire, counsel for H. P. Hood & Sons)

Counsel for H. P. Hood & Sons has stated that it is the company's belief that the reference promotional program does not in any way violate the Maine Statutes relative to the Maine Milk Commission Law.

QUESTION:

Whether the reference premium offer to be advanced by H. P. Hood & Sons upon both quart and half-gallon cartons is in violation of the provisions of the Maine Milk Commission statute?

ANSWER:

Yes.

REASON:

The Maine Milk Commission statute provides, inter alia, that:

> "It shall be unlawful for any person to engage in any practice destructive of the scheduled minimum prices for milk established under this chapter for any market, including but not limited to any discount, rebate, gratuity, advertising allowance or combination price for milk with any other commodity." *7 M.R.S.A. § 2954.* (Third paragraph from the end of the section.)

We believe that certain of the language appearing in *Maine Milk Commission v. Cumberland Farms Northern,* 160 Me. 385, 388 is pertinent. There, it is stated, inter alia, that:

> "Notwithstanding the fact that the obligation to redeem is contingent, its customers are purchasing milk on better terms than they can receive from competitors who offer no expectation of the rebate. To allow such and similar practices to exist would bring chaos to the milk industry."

The language proposed to be printed upon the subject milk cartons by H. P. Hood & Sons states that the Company is advancing a premium offer; which offer is advanced exclusively on Hood milk cartons. In common parlance, the meaning of the word "premium" is "a reward or recompense; a prize in a competition; also, any extra reward or compensation to spur competitors or workers. * * * bonus". (Webster's *New Collegiate Dictionary).* The language in the offer is so written as to lead the reader to conclude that the offer only exists through the medium of the Company's milk carton.

From a reading of 7 M.R.S.A. § 2954 and certain of the language appearing in *Maine Milk Commission v. Cumberland Farms,* supra, we conclude that the reference premium offer constitutes a violation of the Maine Milk Commission Law.

JOHN W. BENOIT
Assistant Attorney General

September 27, 1967
Soil and Water Conservation Committee

Charles L. Boothby Executive Secretary

Administration of Contracts by Soil and Water Conservation Districts.

FACTS:

In your memo of August 25, 1967, and from information supplied as a result of our conversation of September 22, 1967, the following factual situation exists: A Soil and Water Conservation District advertised for bids for construction work, to wit: the construction of a small pond in the Town of Bridgewater. The lowest bid submitted was greater in amount than the amount of federal funds and town monies which the District possessed for expenditure for the project. The process of advertising for bids having been utilized by the District and having resulted in the submission of bids which precluded said District from exercising its power of acceptance, the District has asked you, as Executive Secretary of the State Committee, to negotiate a contract on its behalf. That situation has prompted you to ask the following question:

QUESTION NO. 1:

Is it within the authority of Soil and Water Conservation Districts to award a contract based upon a negotiation of the contract price?

ANSWER:

Yes.

QUESTION NO. 2:

Are there any limitations as to the amount or other limitations upon such negotiated contracts?

ANSWER:

No.

A soil and water conservation district is an agency of the State and also a public body corporate and politic. 12 M.R.S.A. § 6. As pointed out in an opinion of this office rendered on October 31, 1949, such districts are easily distinguishable from those agencies of the State which act as part of the executive branch of state government however.

> "It is to be noted that these districts may sue and be sued. While it is true that the statute states that a district organized under the provisions of the chapter shall constitute an agency of the State, it is to be noted also that such district is a public body corporate and politic, so that it is easily distinguished from State agencies created and acting as part of the executive branch of the State government. In other words, the districts are agencies for the carrying out of soil conservation projects, but are not agencies of government as those words are used when applied to the operation of the executive departments as such. . . ." *1949-1950 Atty. Gen. Reports, p. 119.*

12 M.R.S.A. § 6 subsection 8 provides that districts shall have the power:

". . . to make and execute contracts and *other instruments necessary or convenient to the exercise of its powers;* to borrow money and to execute promissory notes, bonds and other evidences of indebtedness in connection therewith; to make, and from time to time amend and repeal, rules and regulations not inconsistent with this chapter, to carry into effect its purposes and powers."

There is no statutory language which dictates that districts as quasi-municipal corporations must utilize the process of advertising for public bids as the sole means of soliciting offers as a condition precedent to the execution of all contracts. This is particularly true where the subject matter of the contract does not involve the construction of a state project nor the expenditure of state funds.

The law governing the execution of state contracts for public improvements is set forth in 5 M.R.S.A. § 1741-1750.

5 M.R.S.A. § 1741 entitled "Definitions" reads in part as follows:

"Whenever the words 'public improvement' or 'public improvements' shall appear in chapters 141 to 155 they shall be held to mean and include the construction, major alteration or repair of buildings or public works now owned or leased or hereafter constructed, acquired or leased by the State of Maine or any department, officer, board, commission or agency thereof, or constructed, acquired, or leased, in whole or in part with state funds. . . ."

5 M.R.S.A. § 1743 provides for competitive bidding on state contracts for public improvements and reads in part as follows:

"Any contract for any public improvement involving a total cost of more than $3,000, except contracts for professional, architectural and engineering services, shall be awarded by a system of competitive bidding in accordance with chapters 141 to 155 and such other conditions and restrictions as the Governor and Council may from time to time prescribe. . . ."

Contracting by a soil and water conservation district for the construction of a small pond, which construction will in no manner involve the expenditure of state funds, does not constitute the proposed project of the district a state "public improvement" as that term is defined in 5 M.R.S.A. § 1741 above quoted. The utilization of a system of competitive bidding for the awarding of contracts as set forth in 5 M.R.S.A. § 1743 is therefore not applicable to such a project.

When a district, although properly designated as a state agency, seeks to execute contracts which call neither for the constructing of a state "public improvement" as that term is defined in 5 M.R.S.A. § 1741 nor the expenditure of state funds, we conclude that said district is free to negotiate in any manner contracts designed to carry out proper corporate objectives or purposes.

PHILLIP M. KILMISTER
Assistant Attorney General

October 5, 1967
Water Improvement Commission

Raeburn W. Macdonald, Chief Engineer

Ability of WIC to require discharge license of individual discharging "new pollution" through "grandfathered" private sewer into natural watercourse.

FACTS:

As I understand from your memorandum of September 28, 1967, the operator of a trailer park proposes to construct a sewer line to serve the park and to tie in such line with existing domestic sewer lines. These domestic sewer lines were constructed prior to August 8, 1953 and presently empty raw sewage directly into the St. John River.

QUESTION:

May the Water Improvement Commission validly require a discharge license of an individual who proposes to discharge untreated sewage into a river by way of an artificial watercourse constructed prior to the effective date of the statute imposing the license requirement?

ANSWER:

Yes.

OPINION:

The sewage to be discharged from the trailer park will eventually go into the St. John River without any treatment whatever. It will therefore constitute a new source of pollution to the river. The whole thrust of the license statute, Me. Rev. Stat. Ann., Tit. 38, § 413 (1964), is to protect the state's waters by requiring that such new sources be scrutinized by the WIC, which has the power to deny a license to discharge or to grant a license hedged with restrictions sufficient to maintain classification standards.

The fact that the sewage in question here initially flows into a "grandfathered" man-made watercourse prior to entering the river is immaterial. It is not the intital discharge into the man-made watercourse which is in issue, but rather the ultimate discharge into the river. It is this ultimate discharge which constitutes a new source of pollution to the river and must be licensed in order to be valid. *See,* in this regard, opinion of this office dated June 4, 1965, copy of which is hereto appended.

1961-62 Me. Ops. Att'y Gen. 166 is overruled to whatever extent it held that a discharge of the type contemplated here was not subject to license. A wholly different question would be presented if the discharge here was into an artificial watercourse leading to a treatment plant whose final effluent did not constitute a new source of pollution to the receiving body of water.

ROBERT G. FULLER, JR.
Assistant Attorney General

October 6, 1967
Banks and Banking

Irl E. Withee, Deputy Commissioner

Whether or not the Limitations of 9 M.R.S.A. § 6.4 Apply to Regulations Promulgated under 9 M.R.S.A. § 3856

FACTS:

Title 9 M.R.S.A. Chapter 371, entitled "Disclosure of Interest in Finance Charges in Retail Sales" becomes effective on January 1, 1968.

Section 3856 of said Chapter provides in part that the Commissioner "shall prescribe such rules and regulations as may be necessary or proper in carrying out this chapter."

QUESTION:

Do the limitations contained in the provisions of 9 M.R.S.A. § 6.4 apply to regulations promulgated under the authority of the aforementioned 9 M.R.S.A. § 3856?

ANSWER:

No.

OPINION:

The aforementioned 9 M.R.S.A. § 3856 specifically provides that the State Bank Commissioner shall prescribe such rules and regulations that may be necessary or proper in carrying out the provisions of Chapter 371, which, it must be observed, relates to "installment sellers" of goods or services. Title 9 M.R.S.A. § 6.4, however, is general in nature and pertains to the regulation of financial institutions. The term "financial institution" is defined in 9 M.R.S.A. § 222.4 as meaning ". . . . a trust company, savings bank, trust and banking company, institution for savings, loan and building association, savings and loan association or industrial bank organized under the laws of this State." Accordingly, the term "financial institution" does not, in our opinion, include an "installment seller" as it is used in the aforementioned Chapter 371.

It is consequently felt that the specific authority to issue regulations contained in 9 M.R.S.A. § 3856 constitutes an exception to the procedures required by 9 M.R.S.A. § 6.4. Accordingly, it is our opinion that the State Bank Commissioner is not required to follow the procedures outlined in 9 M.R.S.A. § 6.4 when issuing regulations under the authority of 9 M.R.S.A. § 3856.

HARRY N. STARBRANCH
Assistant Attorney General

October 13, 1967
Mental Health and Corrections

Walter F. Ulmer, Commissioner

Functions of Probation and Parole Board Member

FACTS:

In your memorandum of September 27, 1967 it is stated that the Commissioner of the Department of Mental Health and Corrections has appointed the Director of the Bureau of Corrections to serve on the State Probation and Parole Board. As a result of this appointment you have asked in essence the following question:

QUESTION:

Is the Director of the Bureau of Corrections, as a member of the State Probation and Parole Board, permitted to authorize the Director of Probation and Parole to issue a warrant for the arrest of a parole violator?

ANSWER:

Yes; but only when the Commissioner is absent due to illness or other appropriate absence from office.

OPINION:

The authority by which the Commissioner of Mental Health and Corrections has appointed the Director of the Bureau of Corrections to the State Probation and Parole Board is set forth in 34 M.R.S.A. § 1551 which establishes the membership of said Board.

34 M.R.S.A. § 1551 reads in part as follows:

"A State Probation and Parole Board, as heretofore created within the Department of Mental Health and Corrections and in this chapter called the 'board' shall consist of 3 members who are citizens and residents of the State. Two of the members shall be appointed by the Governor, with the advice and consent of the Council, from persons with special training or experience in law, sociology, psychology or related branches of social science. The Commissioner of Mental Health and Corrections shall be ex officio a member of the board, except that he may appoint any suitable person from his department to serve during his pleasure, *in his absence,* as a member of the board, but in no case longer than, his term of office as Commissioner . . ." (Emphasis supplied)

An opinion of this office dated October 10, 1963 held that the Commissioner may not appoint as ex officio member of the Board to serve in his place either the Director of the Division of Probation and Parole or any other employee of such division. The opinion properly held that the Director of the Division of Probation and Parole could not serve as a member of the Board and thus be "simultaneously principal and agent, but must remain in all aspects of his work, subordinate to the Board," The opinion further stated that no employee of the Division of Probation and Parole could be appointed to the Board because of the fact that such an employee could not, by statute, be subordinate to the Director of the Division of Probation and Parole and at the same time serve as a member of the Board and "thus prescribe the duties, supervise the activities of, and delegate authority to his superior, the Director."

The Bureau of Corrections and the duties of its Director are defined in P. L. 1967, Chapter 20, now 34 M.R.S.A. § 525 and 526.

"§526. Establishment; purposes

"The Bureau of Corrections, as heretofore established within the department, shall be responsible for the direction and general administrative supervision of the correctional programs within the Maine State Prison, the Reformatories for Men and Women and the Juvenile Training Centers.

"§526. Director; duties

"The Commissioner shall appoint, subject to the Personnel Law, a Director of Corrections who shall be a person with training; experience, administrative and organizational ability in criminal corrections and correctional administration. It shall be the duty of the director to carry out the purposes of the bureau. In the event of vacancy in both the office of the commissioner and the office of the

Director of Mental Health, or during the absence or disability of both of said officials, the director shall perform such duties and have the same powers as provided by law for the commissioner."

The Director of Corrections is in no manner subordinate to or subject to the supervision of the Director of Probation and Parole in the performance of his duties. He is clearly qualified to be appointed for membership on the board and as a member could direct and delegate certain duties to the Director of Probation and Parole in the same manner as the Commissioner could were the latter to exercise his duties as a Board member.

34 M.R.S.A. § 1675 provides that when a parolee violates a condition of his parole or violates the law a member of the State Probation and Parole Board may authorize the Director of Probation and Parole to issue a warrant for the arrest of said parolee. We see no reason why the Director of Corrections, acting in his capacity as a member of the Probation and Parole Board, could not perform this particular function.

PHILLIP M. KILMISTER
Assistant Attorney General

October 18, 1967
Maine State Retirement System

E. L. Walter, Exec. Secretary

Executive Council Service Credit for Members of the Maine State Retirement System.

FACTS:

The 103rd Legislature enacted Chapter 57 of the Public Laws. This Chapter reads as follows:

"Sec. 1. R.S., T. 5, § 1001, sub- § 10, amended. The first sentence of sub-section 10 of section 1001 of Title 5 of the Revised Statutes, as amended by section 1 of chapter 339 and by section 7 of chapter 513 both of the public laws of 1965, is further amended to read as follows:

' "Employee" shall mean any regular classified or unclassified officer or employee in a department, including teachers in the state colleges and for the purposes of this chapter, teachers in the public schools, but shall not include any member of the Council or any Justice of the Superior Court or Supreme Judicial Court who is now or may be later entitled to retirement benefits under Title 4, section 5, and Title 4, section 103, nor shall it include any Judge of the District Court who is now or may be later entitled to retirement benefits under Title 4, Chapter 5, nor shall it include any member of the State Police who is now entitled to retirement benefits under Title 25, chapter 195.

"Sec. 2, R.S., T. 5, § 1094, sub- § 3, amended. The last paragraph of subsection 3 of section 1094 of Title 5 of the Revised Statutes, as enacted by section 2 of chapter 339 of the public laws of 1965, is amended to read as follows:

'Any member who has served as a member of either the House of Representatives or the Senate, *or as a member of the Executive Council* of the State of Maine, shall be entitled to receive the appropriate creditable service for such legislative *or Executive Council* service. Any member of the retirement system who does serve as a member of the House of Representatives or the

Senate, *or as a member of the Executive Council,* shall have deductions taken from his salaries and shall be entitled to all applicable rights and benefits of this Title. Any such member shall become entitled to receive time credits for the duration of his election or until such time as he shall officially resign from the House of Representatives or the Senate, *or as a member of the Executive Council,* but in no instance shall he receive more than one year of creditable service in any one-year period.' "

A retired person served two terms on the Executive Council. He served in this capacity and retired from Maine State Retirement System employment before the enactment of P. L. 1967 Chap. 57.

QUESTION:

Whether this retired person is included for retirement benefits under P. L. 1967 Chap. 57 by virtue of prior service on the Executive Council?

ANSWER:

No.

OPINION:

Section 2 of Chapter 57 quoted above uses the word "member" in each of its three sentences. Thus, only "members" who have served on the executive council may receive appropriate creditable service for executive council service.

5 M.R.S.A., section 1001, subsection 12, defines "member":

"Member" shall mean any employee included in the membership of the retirement system, as provided in section 1091."

Section 1091, subsection 6, states:

"Should any member withdraw his contributions, *or should he become a beneficiary as a result of his own retirement,* or die, *he shall thereupon cease to be a member."* (Emphasis supplied.)

The law clearly states a beneficiary or person drawing a retirement allowance is not a "member" of the system. Therefore, we must conclude that such a person may not secure an increase in his retirement allowance because of executive council service.

WARREN E. WINSLOW, JR.
Assistant Attorney General

October 30, 1967
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Application of Sales and Use Tax Law to Federal Credit Unions and Federal Savings and Loan Companies

FACTS:

Your memorandum of September 22, 1967, asks whether Federal Credit Unions and

Federal Savings and Loan Companies are subject to the provisions of the Maine Sales and Use Tax Law, particularly in view of the amendment to the Law in Chapter 116 of the Public Laws of 1967.

This legislation was drafted by this office for the express purpose of changing the Sales and Use Tax status of national banks. Briefly, previous opinions reasoned that sales *to* national banks or other federal banks are exempt because of the specific exemption accorded them under the sales and use tax law as agencies of the Federal Government.

We also previously ruled that sales *by* national banks are exempt and that national banks are not required to pay a use tax. We have also ruled that a use tax may be imposed upon the purchaser of tangible personal property sold by a national bank in the ordinary course of business. (See opinions of May 4, 1953; October 4, 1961; October 10, 1961.)

However, the law has now been changed so that sales to incorporated agencies of the Federal Government are exempt only if the agency is wholly owned by the Federal Government.

LAW:

This amendment provides that no tax on sales, storage or use shall be collected upon or in connection with:

> "Sales to the State or any political subdivision, or to the Federal Government or to any *unincorporated* agency *or instrumentality* of either of them *or to any incorporated agency or instrumentality of them wholly owned by them.*" P.L. 1967, Ch. 116 (italic indicates language added by amendment.)

QUESTION:

Whether Federal Credit Unions and Federal Savings and Loan Associations come within the above language so as to be not subject to the sales and use tax law.

ANSWER:

See reasons, below.

REASONS:

Federal Credit Unions

In order to determine the tax status of Federal Credit Unions, under the amended language of the sales and use tax law, it is important to know their legal structure.

A Federal credit union is defined as a cooperative association organized in accordance with the provisions of Title 12 U.S.C.A. for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes. (12 U.S.C.A. § 1752.)

A Federal credit union is organized as a body corporate and in all respects is a corporation with shareholders. (12 U.S.C.A. § 1753 and § 1754.)

Federal credit union membership consists of the incorporators and such other persons as may be elected to membership and as subscribe to at least one share of stock. (12 U.S.C.A. § 1759).

There also appears within the provisions concerning federal credit unions a section concerning permissible taxation by the states.

This provision provides:

"The Federal credit unions organized hereunder, their property, their franchises, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial or local taxing authority; except that any real property or any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial and local taxation to the same extent as other similar property is taxed ...." (12 U.S.C.A. § 1768.)

It appears from a review of the above sections that a Federal credit union is an incorporated entity and is not wholly owned by the United States. It is in fact owned by its various shareholders. Therefore sales *to* a Federal credit union are taxable since they are not within the import of the above exemption provision.

As to the import of the tax provision (§1768, supra), we reach the same conclusion in respect to Federal credit unions as we have reached in the case of national banks.

The Supreme Court of the State of Maine has held in the case of *W. S. Libbey v. Johnson,* (1953) 148 Me. 410 that the incidence of the tax is on the *seller.* A tax on *sales to* a Federal credit union, the incidence of which is on the seller, would therefore not violate the taxing provision. However, such a provision would be violated if a tax was levied or *sales by* a Federal credit union, or if a use tax were levied on *purchases by* a Federal credit union since the incidence of tax, in each instance, would be on the Federal credit union.

Federal Savings and Loan Associations

As in the case of Federal credit unions, we must examine the legal structure of Federal Savings & Loan Associations in order to determine their taxability.

The term "association" means a Federal Savings and Loan Association chartered by the Federal Home Loan Bank Board. (12 U.S.C.A. § 1462.)

Federal Savings and Loan Associations are organized under the provisions of 12 U.S.C.A. § 1464 which provides for a corporate organization. Further provision is found to indicate that such associations shall raise their capital only in the form of payments on such shares as are authorized as in their charter.

There are provisions concerning purchase of certain shares by the Secretary of the Treasury contained in 12 U.S.C.A. § 1464(g) and (j).

However, under the former provision, the Secretary of Treasury, while authorized on behalf of the United States to subscribe for certain preferred shares in such associations, is limited in dollar amount of purchases. There is also a limitation providing that the aggregate amount of the shares held by the Secretary of Treasury shall not exceed at any the aggregate amount of shares held by all of the shareholders.

Subsection (j) provides that the Secretary of the Treasury, may on behalf of the United States, subscribe for an amount of full paid income shares in such associations. The amount paid in by the Secretary of the Treasury for such shares under subsection (j) and under subsection (g) together, however, can at no time exceed 75% of the total investment in the shares of such association by the Secretary of the Treasury and other shareholders.

It is seen that these two subsections indicate that although a Federal Savings and Loan Association may be in part owned by the Federal Government, it cannot become wholly owned by the government.

It has also been held that a Federal Savings and Loan Association organized and chartered by Federal Home Loan Bank Board was an instrumentality and agency of the

United States. See *People of the State of California vs. Coast Federal Savings and Loan Association,* D. C. California 1951, 89 Fed. Supp. 311. See also *State vs. Minnesota Savings and Loan Association,* 1944, 15 N. W. 2d 568, 218 Minn. 220.

There is also present in the law concerning Federal Savings and Loan Associations a provision prohibiting taxation by the States except to the extent permitted by Congress. (12 U.S.C.A. § 1464 (h).

However, even though a Federal Savings and Loan Association may be an instrumentality of the United States, it is not wholly owned by the United States.

Thus, the tax treatment to be accorded to Federal Savings and Loan institutions would be the same as that accorded to national banks and Federal credit unions, that is, a tax would be collected upon sales *to* Federal Savings and Loan Associations since the incidence of tax is not upon them, but no tax could be collected upon sales by such associations and no use tax could be collected from such associations upon their purchases.

JON R. DOYLE
Assistant Attorney General

November 1, 1967
State Probation & Parole

John J. Shea, Director

Waiver of Right to Hearing by Inmate

FACTS:

This office has been asked by the State Probation and Parole Board to render an opinion as to whether or not an inmate of a State correctional institution can waive his right to appear before the Board at hearings under 34 M.R.S.A. § 1672, 1673 and 1675.

QUESTION:

Whether or not an inmate can waive his right to appear at hearings under 34 M.R.S.A. §1672, 1673 and 1675?

ANSWER:

Yes.

OPINION:

34 M.R.S.A.§1672 reads in part as follows:

"A prisoner at the Maine State Prison becomes eligible for a hearing by the board as follows:

". . ."

34 M.R.S.A. § 1673 reads in part as follows:

"An inmate at the Reformatory for Men becomes eligible for a hearing by the board as follows:

". . ."

This language clearly indicates that a hearing on parole under each of these sections is a privilege given to the inmate, and not a right. As there is no right in the inmate to be

present at such a hearing under these Statutes, any privilege he may be given to attend can be easily waived by the inmate. *Bragg v. Hatfield,* 124 Me. 391, 130 Atl. 233 (1925).

34 M.R.S.A. § 1675 reads in part as follows:

". . . At its next meeting at that institution the board shall hold a hearing. The parolee is entitled to appear and be heard. . . ."

A hearing under this section is a right and must be observed. However, the words "entitled to appear" give the inmate the right to appear; but, this right can be waived. The general rule on waiver is stated in 28 Am Jur 2d *Estoppel and Waiver* § 167:

". . . On the principal that errors and irregularities that are not jurisdictional may be waived, an accused may generally waive such matters as the right to counsel, the privilege of immunity from self-incrimination, the right to preliminary hearing or examination, the right to a speedy trial, the right to a public trial, the right to service of copy of indictment or information upon the accused, the right to be arraigned, the right to time to prepare for trial, the right to be tried in the county or district in which the offense was ellegedly committed, the right to challenge a juror for disqualification, the right to the full number of jurors, the right to be confronted by witnesses and have them examined, the right to poll the jury, the quaranty against double jeopardy, and the guaranty against delay in the imposition of sentence . . ."

Again, in 92 C.J.S. *Waiver* at pps. 1066-1068:

". . . the doctrine of waiver extends to rights and privileges of any character, and, since the word "waiver" covers every conceivable right, it is the general rule that a person may waive any matter which affects his property, and any alienable right or privilege of which he is the owner or which belongs to him or to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by constitution, provided such rights and privileges rest in the individual, are intended for his sole benefit, do not infringe on the rights of others, and further provided the waiver of the right or privilege is not forbidded by law, and does not contravene public policy; and the principle is recognized that everyone has a right to waive, and agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, if it can be dispensed with and relinquished without infringing on any public right and without detriment to the community at large. Whether the right relinquished is of great or little value does not affect the capacity of its owner to relinquish it."

Although there appears to be no case which answers the precise question presented, companion cases in related areas show that the right to be present at these types of hearings can be waived, as well as those rights previously mentioned, as it is of the same genus. For example, see *Escabedo v. Illinois,* 378 U.S. 478 (1963) (right to counsel); *Latimer v. State,* 55 Neb. 609 (1898) (right to preliminary hearing or examination); *Randolph v. State,* 234, Ind. 57, 122 N.E. 2d 860 (1954) (right to speedy trial); *Garland v. Washington,* 232 U.S. 642 (1914) (right to be arraigned).

We are therefore of the opinion that an inmate can waive personal appearance before the Board at these types of hearings.

WARREN E. WINSLOW, JR.
Assistant Attorney General

November 1, 1967
Accounts and Control

Henry L. Cranshaw, State Controller

Effective date of legislation.

FACTS:

L. D. 678 authorizing construction of a ferry boat for the Maine State Ferry Service was passed by the 103rd Legislature in regular session. That Legislature adjourned on July 8, 1967.

The Act was presented to the Governor for his signature on July 7, 1967, but was not signed until October 2, 1967. On October 2, 1967 the 103rd Legislature again convened, in special session.

A question has arisen as to the effective date of the Act.

QUESTION:

If the Governor signs an act passed at the regular session of the Legislature, not within five (5) days from presentment, but within the prescribed time limit after the Legislature has re-convened in special session, when does the Act become effective?

LAW:

1. *Each bill must be signed by the Governor within a specified time limit.*

"Every bill or resolution, having force of law . . . shall be presented to the Governor and if he approve, he shall sign it; if not, he shall return it with his objections to the House, in which it shall have originated, which shall enter the objections at large from its journals, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass it, it shall be sent, together with the objections, to the other House, by which it shall be reconsidered, and, if approved by two-thirds of that House, it shall have the same effect, as if it had been signed by the Governor. . . . *If the bill or resolution shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, it shall have the same force and effect, as if he had signed it unless the Legislature by their adjournment prevent its return, in which case it shall have such force and effect, unless returned within three days after their next meeting.*" Constitution of Maine, Article IV, Part 3, § 2. (Emphasis supplied)

2. *Legislative acts become effective 90 days after recess of the Legislature.*

"No Act or joint resolution of the Legislature, except such orders or resolutions as pertain solely to facilitiating the performance of the business of the Legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law, *shall take effect until ninety days after the recess of the Legislature passing it, unless in case of emergency*. . . ." Constitution of Maine, Article IV, Part 3, section 16. (Emphasis supplied.)

3. *'Recess of the Legislature' means adjournment without day.*

". . . 'recess of the Legislature' means adjournment without day of a session of the Legislature. . . ." Constitution of Maine, Article IV, Part 3, section 20. (See

also: (Opinion of the Justices, 1917, 116 Me. 587.)

The only exception to the ninety-day rule is found in Article IV, Part 3, section 19 of the Constitution of Maine which provides that an approved referendum measure, unless a later date is specified in the measure, takes effect thirty days after the Governor has made public proclamation of the result of the vote on the measure.

ANSWER:

See opinion.

OPINION:

Under the scheme set up in the Maine Constitution, acts not subject to referendum become effective a certain number of days *after recess of the Legislature passing the Act.* There is no provision for the running of time after the date of any other act such as affixation of the Governor's signature. (See Maine Constitution, Article IV, Part 3, section 16.)

Note that the only Legislature which can give life to a bill is the Legislature which gave birth to the bill. Without exception, all measures, not subject to referendum, become effective ninety days after the recess of the Legislature passing the measure. Since the same Legislature may be in session more than once, the language might be read as "recess of the legislative *session*" which passed it.

It would seem that the rule should be the same in all cases that a law however signed, or given final passage, becomes effective ninety days after the recess of the legislative session which passes it.

The crucial language in our Constitution is "ninety days after recess of the Legislature."

The general rule is that a statute takes effect according to express constitutional direction. (Sutherland, Statutory Construction, § 1602). For example, legislation might take effect a period of time after passage; adjournment; publication or filing with the Secretary of State.

In some states a bill is effective after "passage." It has been held that the word "passage" means not the final act of approval by the Governor, but the vote of the Legislature. However, other courts have determined that "passage" refers to the date of approval by the executive, or from the time when it otherwise becomes a law under the Constitution, by passage over veto, or by failure to return it to the Legislature.

Under such language, the date from which a time would run is variable, since the date of passage is variable, but in Maine one date would apply – the date of recess of the Legislature. (See: 50 Am. Jur., Statutes, § 505; 82 C.J.S., Statutes, § 404 and Sutherland, Statutory Construction, § 1611.)

The rationale for the rule by some Courts, that the act is effective upon signature by the Governor is that the executive, in passing on the laws that are submitted to him for approval, is considered as a component part of a lawmaking body and is engaged in the performance of a legislative rather than an executive function. (See: 50 Am. Jur., Statutes, § 96.)

The language of our Court in the case of Stuart v. Chapman, 1908, 104 Me. 17, does indicate that the approval of the Governor is the last legislative act which brings the birth of life into a statute and makes it a part of the laws of the State. See: Palmer v. Hickson, 1883, 74 Me. 447.

Even though the Maine Governor occupies such a position, since the effective date of

a bill is dependent upon the date of "recess" rather than "passage" the holding of the above case would not change the result expressed herein.

It makes no difference when a bill is signed by the Governor if in fact it is signed within the proper period. It becomes effective ninety days after recess of the Legislature which passes it. Time of signature is of no essence since the Governor may sign within five days or not sign it at all and the act will still become law and be effective ninety days after recess. The crucial date is date of recess.

THEREFORE,

1. An Act signed by the Governor within five days after presentment to him during a legislative session becomes effective ninety days after the recess of that legislative session.

2. An Act not signed by the Governor, while the Legislature is in session, and not returned by him within five days, becomes effective ninety days after recess of the legislative session.

3. An Act not signed by the Governor while the Legislature is in session but returned by him within the five-day period and passed by the Legislature over his objections, becomes effective ninety days after the recess of that legislative session.

4. An Act not signed by the Governor when a session of the Legislature terminates by recess before the expiration of five days and the Governor fails to return it with his objections within three days after their next meeting becomes effective ninety days after the recess of the legislative session which passed it.

5. An Act signed by the Governor within three days after the Legislature reconvenes, within the ninety day period, when the session of the Legislature passing the Act terminated by adjournment, previous to the expiration of the five-day period, becomes effective ninety days after the date on which the Legislature passing it recessed.

6. To the same extent, an Act signed by the Governor, within three days after the Legislature reconvenes, beyond the ninety day period, when the session of the Legislature terminated by adjournment, previous to the expiration of the five-day period, becomes effective immediately, since the Governor's signature is essential to the Act's effectiveness.

7. Too, an Act not signed by the Governor and not returned to the Legislature within three days after the Legislature reconvenes, beyond the ninety-day period, when the session of the Legislature terminated by adjournment, previous to the expiration of the five-day period, becomes effective immediately upon the expiration of the period of time in which the Governor has to act.

If in the same circumstances, the Governor returns the Act within the three-day period, unsigned with his objections and the Legislature passes the Act over his objections, it becomes effective immediately upon final passage by the Legislature pursuant to Article IV, Part 3, section 2 of the Constitution of Maine.

JON R. DOYLE
Assistant Attorney General

November 13, 1967
Mental Health and Corrections

William E. Schumacher, M.D., Director

Mentally Ill Physicians; Me. Rev. Stat. Ann., Tit. 32, § 3152 (1964).

FACTS:

Me. Rev. Stat. Ann., Tit. 32, § 3152 (1964) provides in substance that a licensed physician must report to the Department of Mental Health and Corrections whenever he is treating another licensed physician for mental illness. Upon receipt of such report, the Department is directed to conduct an investigation to determine whether the illness seriously impairs the affected physician's ability to practice medicine. If so, provisions exist for suspension of the physician's license by the Board of Registration in Medicine.

You have brought to our attention a possible problem in the effective administration of this law, the problem being that a physician who wishes to seek psychiatric treatment for a minor neurosis, which he feels does not affect his ability to practice medicine, may not do so for fear that his license will be jeopardized. You have, therefore, requested this Office, in effect, to set a standard of severity of mental illness, below which a treating physician need not make the statutorily required report.

QUESTION:

How "mentally ill" must a physician be before the physician treating him must file the report with the Department of Mental Health and Corrections required by Me. Rev. Stat. Ann., Tit. 32, § 3152 (1964)?

OPINION:

A definition of the term "mentally ill," as used in the cited statute, is not within the capabilities or province of this Department. Such a definition can only be made by those possessing the requisite professional training and experience. Psychiatrists themselves concede that the concept of mental illness is ephemeral, and disagree among themselves as to its manifestations.

The Legislature's intent is to protect the public from physicians whose mental condition seriously interferes with their ability to render adequate medical treatment. To this end, it has required that *all* mental illnesses of physicians, of whatever type and severity, be reported to the Department, and it is to be noted that the burden has been placed by statute squarely on the Department of Mental Health and Corrections, which is staffed with trained psychiatric personnel, to make the determination whether the mental illness reported "seriously interferes with (the affected physician's) ability to practice medicine." It is only such certification by the Department to the Bureau of Registration in Medicine of "serious interference" which can furnish cause for license suspension.

In view of the mandatory language in the statute we do not consider it our function to define how "mentally ill" a physician must be before his attending physician must file a report. We would further point out the extensive procedures under the statute with which conformance must be had before a mentally ill physician's license can be suspended. These procedures, to us, appear to offer adequate safeguards to bar any fear on the part of a physician that his license will be suspended because of a minor neurosis not seriously affecting his professional abilities.

However, if the present language of the statute is considered by your profession as having the practical effect of discouraging doctors from seeking psychiatric help, it might be well to attempt the inclusion of clarifying amendments at the 1969 session of the Legislature. You, yourselves, in the Bureau of Mental Health will have to determine at what point "mentally ill" affects practice. Beware of easy definitions. Surely some major hysterics are more disabled than some mild psychotics. This Office cannot supply much help in this area except to point out that hard and fast rules often don't work.

ROBERT G. FULLER, JR.
Assistant Attorney General

November 27, 1967
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Subject: Effect of Increased Sales Tax Rate on "Interim Rental" Transactions

QUESTION:

Whether the increase in the sales tax rate, which became effective November 1, 1967, will apply to the tax on rental payments under leases entered into prior to November 1, where the lessor has elected to account for tax under the provisions of Section 1758 of the Sales and Use Tax Law.

LAW:

"Every person making a purchase for resale or use in this State and other than at casual sale of any article of tangible personal property as to which no sales tax has been paid pursuant to Chapters 211 to 225 and renting it to another in this State shall be liable for a use tax thereon as provided in Section 1861 based on the purchase price thereof, unless such renting is while holding it for resale and unless within 30 days after first so renting it he certifies in writing to the Tax Assessor on a form prescribed and furnished by the Tax Assessor that such article was purchased by him for resale. A tax is imposed at the same rate as that provided in the case of sales taxes by Section 1811 upon all rentals received by such person for use of the article covered by such certification; and if such person thereafter makes any use of, or disposes of, such article other than by renting it to others or by making a sale thereof which is subject to a sales tax or by holding it for such sale, he shall be liable for a use tax thereon as provided in Section 1861 based on the purchase price paid therefor by him less the aggregate amount of tax paid pursuant to this Section on the rentals thereof. The tax on rentals imposed by this Section shall be subject to Section 1812 and all other pertinent provisions of Chapters 211 to 225 and for the purposes thereof shall be treated the same as the sales tax imposed by Section 1811 with the rentor deemed to be the retailer, the rentals deemed to be the sale price, and the rentee deemed to be the purchaser and consumer. Any certification under this Section shall cover one article only with its attachments and accompanying accessories, if any. The term 'renting' as used in this Section shall include renting, letting, leasing and chartering and the term 'rentals' as used in this Section shall include any receipts derived from the use of any such article covered by any such certification." Title 36 M.R.S.A. § 1758.

ANSWER:

The increase in the sales tax rate, which became effective November 1, 1967, will apply to the tax on rental payments received after October 31, 1967, even though they be rental payments under leases entered into prior to October 31, 1967, where the lessor has elected to account for the tax under the provisions of Section 1758 of the law.

REASONS:

The above section contains a provision to cover cases where personal property which

has in fact been purchased for resale, is rented as an incident to holding the property for resale rather than as a regular business. Section 1758 permits the retailer in such cases to elect to pay the tax on rental payments rather than on the purchase price.

The rate of tax is the same as for sales of personal property. All other provisions of the Sales and Use Tax Law apply to this scheme of taxation. The rentor is the retailer, the rentals are the sales price and the rentee is the purchaser and consumer.

Since the sales tax rate applies to interim rentals, it becomes necessary to examine the enacting law and its relationship to the rental provisions.

> "Sales and use tax liability *accruing* after October 31, 1967 shall be computed on the basis of the rates imposed by Section D. Retail sales and purchases made after October 31, 1967, including retail sales and purchases made pursuant to contracts entered into prior thereto and telephone, telegraph charges first billed on or after November 1, 1967 shall be subject to the taxes imposed by Section D." (Emphasis supplied). C. 191 P & S.L. of 1967 § D (4).

Under the scheme set up in the statute concerning the reporting and payment of tax on interim rentals, the tax is due when the rental payments are due. The law contemplates that each rental payment shall be considered as a separate transaction and that tax will be paid separately on each rental receipt.

Under the language of Ch. 191 above tax is due at the rate of 4½% of liability *accrues* after October 31, 1967.

Therefore, since each rental payment is treated as a separate transaction, the rate of 4½% applies to each rental payment received by the rentor-retailer subsequent to October 31, 1967 whether or not the contract of lease was entered into prior to November 1, 1967.

JON R. DOYLE
Assistant Attorney General

December 15, 1967

BAXTER STATE PARK AUTHORITY

Power of Baxter State Park Authority to Purchase Property Located on Leased State Land Within Baxter State Park

FACTS:

A request has been made for an opinion concerning the prerogative or lack of prerogative of the Baxter State Park Authority to purchase property located on leased State land within the confines of the Park without Governor and Executive Council approval.

QUESTION:

May the Baxter State Park Authority purchase at a negotiated price without Governor and Executive Council approval certain tangibles, capital improvements, inventory, as well as other personal property, all of the foregoing being located on State land within the confines of the Baxter State Park leased to the seller by the State?

ANSWER:

Yes.

OPINION:

All of the tangible property, capital improvements and inventory located on the leased State land is personal property and not realty. It is assumed for purposes of this opinion that the Baxter State Park Authority is either a party to, or has actual notice of, an agreement that the buildings at the time they were erected upon the land, were to be considered personal property.

It is well-established law in the State of Maine that an agreement that a building erected with the consent of the land owner, by one not the owner of the land upon which it is erected, shall be and remains personal property. *Tapley v. Smith,* 18 Me. 6. (Shep. 12). *Adams v. Goddard,* (1859) 48 Me. 212. Without such an agreement, the building becomes annexed to the realty. *Bonney v. Foss,* 62 Me. 248. Such an agreement is effective as to the owner of the land, his heirs, devisees, and all persons having actual notice of the agreement; but to be effective against others, the agreement must be in writing and signed by the land owner or a duly authorized person and acknowledged and recorded. *33 M.R.S.A. § 455.* It should be noted that for tax purposes buildings erected on the land of another are considered real property. *36 M.R.S.A. § 551* as amended by Public Laws of 1967, Chapter 271, § 1.

12 M.R.S.A. § 901 as repealed and replaced by the Public Laws of Maine 1965, Chapter 225, § 17, confirmed that all of certain specified lands donated and conveyed, and all lands within certain specified areas to be donated and conveyed to the State of Maine by Percival Baxter, have been and will be in trust for state forest, public park and public recreational purposes, and will be named Baxter State Park in honor of Percival Baxter. The reference section then establishes the supervision, control and management of the Baxter State Park by reading in pertinent part as follows:

> "They shall be under the joint supervision and control of, and shall be administered by the Forest Commissioner, the Commissioner of Inland Fisheries and Game and the Attorney General, and the said commissioners and Attorney General shall have full power in the control and management of the same, under the title of Baxter State Park Authority."

As the administrating body, the Baxter State Park Authority has been given full power and management over Baxter State Park. It must follow that the Baxter State Park Authority has power and control sufficient to purchase personal property within the confines of the Park without obtaining approval of the Governor and Executive Council; especially since the funds used to purchase the personal property are trust funds managed and controlled by the Baxter State Park Authority.

The only limitation on the powers and duties of the Baxter State Park Authority in its control and management of the Park is stated in 12 M.R.S.A. § 906 as amended by the Public Laws of Maine, 1965, Chapter 226, § 20, which reads as follows:

> "The powers and duties of the Baxter State Park Authority shall not be so construed as to interfere or conflict in any way with the powers and duties of the Maine State Park and Recreation Commission, Department of Inland Fisheries and Game or the Forestry Department and their duly appointed wardens or rangers, and the enforcement of the inland fisheries and game and forestry laws in respect to Baxter State Park or to the State generally."

Thus, it is clear that nothing in the foregoing section requires the Governor and Council to approve a purchase of personal property by the Baxter State Park Authority; nor have we found any other reference in Maine law requiring such approval.

JEROME S. MATUS
Assistant Attorney General

December 29, 1967
Water and Air Environmental
Improvement Commission

Raeburn W. Macdonald, Chief Engineer

Questions arising by virtue of new, greater discharge of polluting waste at site of "grandfathered" processing establishment.

FACTS:

A laundry service existed in Buckfield prior to August 8, 1953 and continued in operation until 1961 or 1962. This service operated four washing machines and discharged its laundry waste directly through a private outfall into an adjoining river. Sometime in 1961 or 1962 the proprietor of the laundry service sold out, and the new owner now operates a self-service laundromat on the premises, utilizing thirteen washing machines, which discharge their waste through the existing outfall. The laundromat operator has no waste discharge license. A prospective buyer of the laundromat has been denied mortgage financing because of this non-licensure.

In view of the foregoing, you have posed six questions which will be answered in the order in which they were presented:

QUESTION: NO. 1:

Should the Commission hold a license hearing for the prospective buyer?

ANSWER NO. 1:

Yes. Even if the present owner were licensed, such license is non-transferable of right and the Water and Air Environmental Improvement Commission is not empowered to transfer a license from the initial licensee to a subsequent party. *See* 1959-1960 Me. Att'y Gen. Rep. 120; *see generally* Me. Rev. Stat. Ann., Tit. 38, § 414 (1964).

QUESTION NO. 2:

Is the existing installation exempt from the license requirements of Me. Rev. Stat. Ann., Tit. 38, § 413 (1964) by virtue of the so-called "grandfather clause" in this section?

ANSWER NO. 2:

No. Me. Rev. Stat. Ann., Tit. 38, § 413 (1964) provides:

> "No license from the commission shall be required . . . for any manufacturing, processing or industrial plant or establishment, operated prior to August 8, 1953, for *any such discharge* at its present general location, such license being hereby granted." (Emphasis added.)

It is undisputed that a laundry was in existence on August 8, 1953 at the site presently occupied by the laundromat. This prior operation, however, discharged waste from but *four* washing machines. The present operation discharges waste from *thirteen* machines. The language emphasized above in section 413 relates back to the first sentence in the section which reads:

"No person . . . shall discharge into any . . . stream . . ., whether classified or unclassified, any waste, refuse or effluent from any manufacturing, processing or industrial plant or establishment or any sewage so as to constitute a new source of pollution to said waters without first obtaining a license therefor from the commission."

As we read the statute in its entirety, we interpret it to exempt from license only discharges of waste, refuse or effluent from manufacturing, processing or industrial plants or establishments, or discharges of sewage, *in the same volume and of the same general type as were discharged at the site prior to August 8, 1953.* Any change in discharge volume, or change in the nature of such discharge, so as to constitute a new source of pollution to the receiving body of water, must be licensed by the commission to be lawful.

We must emphasize, however, that for a valid order to issue from the WAEIC aimed at abating a violation of "Grandfather rights", or for the Attorney General to successfully maintain an injunction action for such violation, evidence must be presented showing the difference between the discharge complained of and the discharge prior to August 8, 1953, and that such difference constitutes a new source of pollution to the receiving body of water.

QUESTION NO. 3:

Does the present laundromat operator need a waste discharge license?

ANSWER NO. 3:

Such operator must obtain a license if (1) his present discharge differs in volume or in nature from the discharge existing at his present location on August 8, 1953; and, (2) such differing discharge constitutes a new source of pollution to the receiving stream.

QUESTIONS NOS. 4, 5, 6:

These questions make reference to a previous opinion of this office dated August 30, 1962 which interpreted Rev. Stat. Me., ch. 79, § 8 (1954), now Me. Rev. Stat. Ann., Tit. 13, § 413 (1964), to mean that no license could be required of a person whose pollution emptied into a man-made watercourse or municipal sewer rather than directly into a natural watercourse. This interpretation applies only to situations where the pollution goes into a man-made system *and* enters a treatment plant, the final effluent of which does not pollute the receiving body of water. *See* opinion of this office dated October 5, 1967. All new connections to an existing "grandfathered" direct outfall must be licensed if such connection changes the volume or nature of the discharge from the outfall and results in the addition of new pollution to the receiving body of water. *See* Answer No. 2, *supra.* We believe this exposition answers your last three questions.

ROBERT G. FULLER, JR.
Assistant Attorney General

January 2, 1968
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Subject: Treatment of leases with option to purchase under sales and use tax law.

QUESTION:

If a lease with written option to purchase is entered into prior to November 1, 1967, and the option to purchase is exercised subsequent to November 1, 1967, then is the sales tax applicable to the purchase at the 4% rate in effect at the time the lease with option to purchase was entered into, or the 4½% rate in effect at the time the option to purchase was exercised?

LAW:

P. & S. L. 1967, Ch. 191, Sec D(4) states:

"Effective date. Sales and use tax liability *accruing* after October 31, 1967 shall be computed on the basis of the rates imposed by Section D. Retail sales and purchases made after October 31, 1967, including retail sales and purchases made pursuant to contracts entered into prior thereto and telephone and telegraph charges first billed on or after November 1, 1967, shall be subject to the taxes imposed by Section D."

ANSWER:

The increase in the sales tax rate, which became effective November 1, 1967, will apply to the sales price where the option to purchase is exercised subsequent to November 1, 1967, even though the lease with option to purchase was entered into prior to November 1, 1967.

REASONS:

The question here is when did the sale take place.

"An option is not of itself a purchase, but merely secures the privilege to buy. Its distinguishing characteristic is that it imposes no binding obligation on the person holding the option, aside from the consideration for the offer. Until acceptance it is not, properly speaking, a contract, and does not vest, transfer, or agree to transfer, any title to, or interest or right in, the subject matter, but is merely a contract by which the owner of the property gives the optionee the right or privilege of accepting the offer and buying the property on certain terms; and until the option is exercised the delivery of the goods to the optionee is a mere bailment." C.J.S., Sales § 33.

"There is no completed contract for the sale of the property until the optionee has accepted the offer according to its terms, or, to put it otherwise, has performed the condition contained in the offer." Corbin on Contracts, § 264, footnote No. 44.

Under the language of Chapter 191 above tax is due at the rate of 4½% if liability accrues after October 31, 1967. The sales tax liability accrues at that point in time when the option is exercised. If the option is exercised on November 1, 1967 or later, then the

applicable rate of tax is 4½%.

WENDELL R. DAVIDSON
Assistant Attorney General

January 10, 1968
Bureau of Watercraft Registration and Safety

Robert H. Johnson, Director

Transmittal of Boating Accident Reports by the Bureau to Private Sources.

FACTS:

Pursuant to the terms of 38 M.R.S.A. § 239 the operator of any watercraft involved in an accident which results in injury to another person or damage to property in an amount of $50.00 or more is compelled to submit a written report of said accident to the Bureau of Watercraft Registration and Safety. In your memorandum submitted to this office under date of December 11, 1967, you state that the Bureau of Watercraft Registration and Safety transmits copies of these accident reports to the U. S. Coast Guard which assembles the data into yearly statistical accident reports. This is done pursuant to express statutory authority. You state in your memo that frequently the Bureau receives requests from insurance companies, claims offices, attorneys, etc., for copies of these accident reports. In reference to these private inquiries you ask the following question:

QUESTION:

Is it permissible for the Bureau to transmit copies of these accident reports to such private sources in accordance with Title 38, section 239 or any other statutes of our State with respect to the transmittal of official state records?

ANSWER:

No, unless the author of the report consents to a transmittal of same.

OPINION:

Reports of private individuals to government officials, even pursuant to statute, are generally held not to be public records unless made so by statute. Any reports or surveys of accidents compiled by the Bureau would be public records but the reports of private individuals furnished to the Bureau are of a confidential nature.

38 M.R.S.A. § 239 entitled "Accidents" provides in part as follows:

> "3. Accident reports. The operator of any watercraft involved in any accident or casualty, which results in death, disappearance or injury to any person or damage to property to the estimated amount of $50. or more, shall report the same by the quickest means possible to the nearest available inland fisheries and game warden, coastal warden, state police officer, or the sheriff of the county where the accident occurred. All law enforcement officers shall forthwith report accidents to the bureau. The operator shall file a written accident report on forms provided by the bureau within 48 hours. He should include his name and address

and such other information as required by the bureau.

"4. Transmittal of information. In accordance with any request duly made by an authorized official or agency of the United States, any information compiled or otherwise available to the bureau pursuant to this section shall be transmitted to said official or agency of the United States."

The transmittal of the contents of accident reports is specifically restricted according to the terms of subsection 4 of the above-quoted statute. Had the legislature intended to make the contents of said reports available for public inspection, it clearly would have expressly provided therefor.

It may well be that in the future the legislature may see fit to make boating accident reports as readily accessible to public inspection as motor vehicle accident reports. In regard to the latter, 29 M.R.S.A. § 891 provides that the Chief of the State Police may furnish photocopies of motor vehicle accident reports to any person requesting same. Whether or not the Bureau of Watercraft Registration and Safety should have similar authority in regard to revealing the contents of boating accident reports is purely a matter for the legislature to determine. As the law now stands, however, we do not believe such authority can be implied.

By requiring individuals to submit reports of boating accidents, we believe that the legislature intended that such information should be elicited by the Bureau only as a basis for gathering information and data as an aid toward a greater understanding of boating accident causation and abatement of same.

PHILLIP M. KILMISTER
Assistant Attorney General

January 18, 1968
Public Utilities

David K. Marshall, Chairman

Issuance of Findings of Public Utilities Commission to House of Representatives Per Order.

FACTS:

On January 12, 1968, the House of Representatives ordered that the Public Utilities Commission be directed to report, by January 19, 1968, to the House of Representatives "its findings relating to the natural gas shortage and resulting explosion in the South Portland area."

Presently, the Commission is conducting an investigation of the reference natural gas shortage pursuant to 35 M.R.S.A. § 141. The reference section contains the following language, inter alia:

" * * * Neither the order nor recommendation of the Commission nor any accident report filed with the Commission shall be admitted as evidence in any action for damages based on or arising out of the loss of life or injury to the person or property referred to in this section."

QUESTIONS:

1. Whether or not the Commission may issue findings to the House of Representatives pursuant to the instant order notwithstanding the provisions of 35 M.R.S.A. § 141?

2. If so, do the statutes of the State of Maine contain any prohibition precluding the Commission from complying with the Order of the House of Representatives?

ANSWERS:

1. Yes.
2. No.

REASON:

First, it is noted that the House Order requests "findings" from the Commission; and that Section 141 of Title 35 uses the word "order" in establishing a particular bar relative to the use of the Commission's order.

In the event that an order contains findings, the Commission's issuance of its findings to the House relative to the legislative mandate constitutes compliance with that mandate. We do not interpret the above-quoted bar as precluding the Commission from complying with the House Order.

Our examination of the plural provisions of the Maine Statutes fails to reveal the existence of language prohibiting the Commission from complying with the House Order.

JOHN W. BENOIT
Assistant Attorney General

January 25, 1968
Maine Recreation Authority

Lloyd K. Allen, Manager

Insurability of Recreational Project Loans Contracted for Prior to Effective Date of Me. Rev. Stat. Ann., Tit. 10, § 6003 (2) (Supp. 1967).

FACTS:

Me. Public Laws 1965, ch. 495, created the Maine Recreation Authority. One of the principal purposes of the Authority is to pledge the full faith and credit of the state to insure payments made by local recreational development corporations on their mortgages to lenders. One of the criteria for eligibility of a recreational project loan for Authority insurance under the creating act was that the principal obligation, including initial service charges and appraisals, inspection and other fees approved by the Authority, had to be at least $50,000 and not exceed 90% of the project cost.

On May 11, 1967 the Authority, pursuant to vote duly taken at its meeting held that day, executed a conditional insurance agreement. Such conditional agreements are the first step toward insurance, by the Authority, of recreational project loans. They contain a formal recital that the project is eligible for insurance and that the lender is responsible, and also bind the Authority to insure the loan payments once the project is completed to the satisfaction of the local development corporation and leased to a tenant. The principal amount of the note pursuant to whose terms payments, to be insured by the Authority, were to be made, was recited as $67,000 and such sum was further recited as less than 90% of the project costs as determined by the Authority.

Thus, under the law existing at the date of execution of the conditional agreement, the principal obligation of the subject recreational project loan met the statutory criteria, relative to amount and percentage of project cost, for Authority insurability.

Me. Public Laws 1967, ch. 481, § 4, however, changed these statutory criteria. Such section (now codified as Me. Rev. Stat. Ann., Tit. 10, § 6003 (2) (Supp. 1967)) now requires the principal obligation of recreational project loans to be at least $100,000; not to exceed 20% of the amount set forth in Me. Const., Art. IX, § 14-B; and not to exceed 75% of the project cost at the time the mortgage is executed. This amending section became law on January 1, 1968.

The conditions prerequisite to issuance of the Authority's insurance contract to cover the loan on the subject recreational project were fulfilled after January 1, 1968. Counsel for the proposed mortgagee bank has questioned whether the Authority can now issue its contract on such project since the project's principal obligation does not meet the criteria, relative to amount and percentage of project cost, established by the amending section referred to above. In view of counsel's doubts, you ask the following question:

QUESTION:

May the Maine Recreation Authority legally issue, subsequent to January 1, 1968, a contract of insurance covering a first mortgage on a recreational project where: (1) said mortgage involves a principal obligation, including initial service charges and appraisals, inspections and other fees approved by the Authority, in an amount of less than $100,000 but not less than $50,000 and in an amount in excess of 75% but not in excess of 90% of the cost of the project; and (2) the Authority issued prior to January 1, 1968 a conditional insurance agreement, otherwise in accordance with law, covering said mortgage on said recreational project, provided: (a) that said mortgage is otherwise eligible for Authority insurance under Me. Rev. Stat. Ann., Tit. 10, § 6003 (Supp. 1967); (b) that the parties to the conditional insurance agreement have complied with the terms thereof; and (c) that the aggregate amount of the principal obligations of all outstanding mortgages so insured does not exceed the amount set forth in Me. Const., Art. IX, § 14-B?

ANSWER:

Yes.

OPINION:

The first step, in reaching the conclusion that the Authority has power to insure the loan, is to recognize that the Conditional Mortgage Insurance Agreement executed by the Authority on May 11, 1967 is a classic unilateral contract. The Authority has, under the agreement, obligated itself to issue the mortgage insurance agreement upon the occurrence of certain conditions specified in the conditional agreement – "completion of the project, acceptance thereof by the landlord, and the putting into effect of the agreed upon long term lease of said project. . . ."

Once the nature of the conditional agreement becomes apparent, it follows that to reach any other conclusion would fly in the face of Me. Const., Art. I, § 11, and U. S. Const., Art. I, § 10 (the so-called "contract clauses"). The doctrine that the law in force when a contract is made enters into and comprises a part of the contract itself is so well settled as to require no further exposition in this opinion. *See, e. g.,* Wood v. Lovett, 313

U. S. 362, 370 (1941). It was likewise early settled that the protection of the contract clause extends to contracts in which the State is a party as well as to contracts between private individuals. *See* Fletcher v. Peck, 6 Cr. 87 (1810).

Accordingly, it is our opinion that the provisions of Me. Public Laws 1967, ch. 481, § 4, which modified existing law so as to increase the principal obligation of recreational project loans and decrease the percentage of net project costs which such loans may comprise, cannot operate to invalidate a conditional mortgage insurance agreement executed by the Maine Recreation Authority in compliance with the law existing at the date of execution.

ROBERT G. FULLER, JR.
Assistant Attorney General

February 15, 1968
Executive

Honorable Kenneth M. Curtis, Governor

Appointment of Employee of State College to the State Board of Education.

FACTS:

The Maine Revised Statutes relating to Education provide, inter alia, that the State Colleges specified in 20 M.R.S.A. § 2301 are under the direction of the State Board of Education; and that the Board has charge of the general interests of those State Colleges, including the employment of teachers and lecturers for the State Colleges.

> "The state colleges shall be under the direction of the state board. Said board shall have charge of the general interests of said colleges; shall see that the affairs thereof are conducted as required by law and by such by-laws as the board adopts; employ teachers and lecturers for the same; and shall have authority, by and with the consent of the Governor and Council, to dispose of and acquire property for the improvement of the plants and grounds; and biennially render to the Governor and Council an accurate account of the receipts and expenditures for the biennium preceding, including same as a part of the commissioner's report. The clerical and staff services for this board shall be performed by the employees of the department under the direction of the commissioner. The head of a state college shall be designated as a president." *20 M.R.S.A. § 2305.*

QUESTION:

Does the law prohibit the Governor from appointing an employee of a State College to the State Board of Education?

ANSWER:

Yes.

REASON:

The provisions of 20 M.R.S.A. § 2305 specify that the State Colleges (designated in

2301) are under the direction of the State Board of Education; that the reference Board has charge of the general interests of those colleges to the extent that the affairs of the State Colleges are conducted as is required by law; and that the employees and lecturers for the State Colleges are employed by the State Board of Education. If the instant appointment materialized, and the employee of the State Board of Education became a Board member, he would be both "employee" and "employer".

Respectfully, fulfillment of the appointment would create a situation which would violate the common law doctrine of incompatibility of offices; as that doctrine is expressed in *Howard v. Harrington,* 114 Me. 443, 96 A. 769. (In citing *Howard v. Harrington,* supra, we do not borrow the facts of that case; but, do borrow the doctrine and the reasoning expressed in the case.) We mention the doctrine of incompatibility of offices because even though specific constitutional and statutory provisions furnish no bar to a person's holding of particular offices or positions simultaneously, the common law must be considered in determining whether a contemplated appointment will create incompatibility; unless the Legislature has, by clear and unambiguous language, evidenced its intention to abrogate the common law principle to the extent of permitting a person to hold incompatible offices. *Childs v. Moses,* 178 Misc. 828, 36 N.Y.S. 2d 574, aff'd. 264 App. Div. 353, 38 N.Y.S. 2d 704, aff'd. 290 N.Y. 828, 50 N.E. 2d 235, motion granted, 290 N.Y. 925, 50 N.E. 2d 307. Also see *Rainey v. Stovall,* – Ky. –, 361 S.W. 2d 518.

The question of incompatibility of offices necessarily depends on the circumstances of the individual case. *Kobylarz v. Mercier,* 130 N.J. Law 44, 31 A.2d 208; *Mosher v. Board of County Commissioners of Howard County,* 235 Md. 279, 201 A.2d 365.

It has been generally decided that the inconsistency, which at common law renders offices incompatible, does not accure by reason of the physical impossibility to discharge the duties of both offices; but lies, instead, in a conflict of interest, such as when one office is subordinate to the other, and is subject in some degree to the supervisory power of the other. *Russell v. Worcester County,* 232 Mass. 717, 84 N.E. 2d 123; *In Re Opinion of the Justices,* 61 R.I. 197, 21 A.2d 267; *State ex rel Doherty v. Finnegan,* 25 Conn. Supp. 390, 206 A.2d 477; and *Hetrich v. County Commissioners of Anne Arundel County,* 222 Md. 304, 159 A.2d 642. Here, the position of teacher or lecturer who is employed at one of those state colleges specified in 20 M.R.S.A. § 2301, et seq., is subordinate to and subject to the supervisory power of the State Board of Education.

QUESTION:

If the answer to the above question is in the affirmative, is the Governor legally authorized to appoint an employee of a State College to the State Board of Education, if such appointment is made subsequent to the effective date of P. & S. 1967, c. 229 (L.D. 1849)?

ANSWER:

Yes, provided that such appointee does not, by reason of serving on the State Board of Education, become a member of the Board of Trustees as is provided in P. & S. 1967, c. 229, § 2.

REASON:

Thirty days after the effective date of P. & S. 1967, c. 229, the Board of Trustees, the Chancellor, the Administrative Council, and the heads of the various campuses shall

become vested with duties relative to the operation of the University of Maine. For example, the Board of Trustees shall constitute the governing and planning body of the University. Too, the head of each campus shall be responsible for academic programs under his direction. The provisions of 20 M.R.S.A. § 2305, while not specifically repealed by P. & S. 1967, c. 229, are nevertheless affected to the extent that the provisions of section 2305 will no longer be operative relative to the administration of the University of Maine. That being so, your appointment of an employee of one of the campuses of the University of Maine to the State Board of Education would not involve the principle of incompatibility of offices. However, it should be noted that such appointee cannot, in turn, be appointed as a trustee of the University (as is specified in section 2 of the instant Act) without involving the doctrine of incompatibility mentioned herein for the reasons set out in our answer to the initial question.

JOHN W. BENOIT
Assistant Attorney General

February 29, 1968

Honorable William Dennett
Kittery
Maine

Dear Mr. Dennett: Re: Liquor Commission – Administrative Code

FACTS:

You have asked this office for opinions re the following two matters.

QUESTION NO. 1:

Do the procedures for the adoption, filing and taking effect of rules and regulations of 'agency' under the Administrative Code apply to the Liquor Commission?

ANSWER:

Yes.

OPINION NO. 1:

There can be no doubt that the State Liquor Commission is an 'agency' subject to provisions of Chapters 301 through 307 of Title 5. 5 M.R.S.A. § 2301, subsection 1, lists those agencies subject to the Administrative Code. The section reads in pertinent part:

" § 2301. Definitions

For the purpose of chapters 301 to 307:

"1. Agency. 'Agency' means the following State boards, commissions, departments or officers authorized by law to make rules or to adjudicate contested cases:

. . . .

"State Liquor Commission

. . . . "

The addition of the State Liquor Commission to the State agencies subject to the

Administrative Code occurred in 1963 (Public Laws 1963, Chapter 412, section 1).

5 M.R.S.A. sections 2351 and 2352 sets forth the procedure for the adoption, and the filing of rules and regulations under the Administrative Code with the Secretary of State, and the effective date of the rules and regulations thus filed. The sections read as follows;

" § 2351. Adoption

In addition to other rule-making requirements imposed by law:

"1. Adopt rules. Each agency may adopt, amend and repeal rules of practice before it, together with forms and instructions.

"2. Descriptive statements. To assist interested persons dealing with it, each agency shall so far as practicable supplement its rules with descriptive statements of its procedures.

"3. Notice of action. Prior to the adoption, amendment, or repeal of any rule, the agency shall, so far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit suggestions orally or in writing.

"4. Form and legality. Prior to the adoption, amendment or repeal of any rule authorized by law, the agency shall submit the proposal to the Attorney General for approval as to form and legality."

"§ 2352. Filing and taking effect

"Each agency shall file forthwith with the Secretary of State a certified copy of each rule hereafter adopted by it and each rule in effect on September 16, 1961. The Secretary of State shall keep a permanent register of such rules open to public inspection.

"1. Approval. The adoption, amendment or repeal of a rule by an agency shall not hereafter become effective until approved as to form and legality by the Attorney General. Approval shall be presumed if the Attorney General takes no action within a period of 30 days after the proposal is submitted.

"2. Effective date. Except as set forth in subsection 1, the adoption, amendment or repeal of a rule by an agency shall become effective upon filing with the Secretary of State, unless a later date is required by statute or specified in the rule."

While it is true that 5 M.R.S.A. § 2302 states that, "In any conflict between chapters 301 to 307 and Title 28, the provisions of Title 28 shall prevail." – an adoption, filing, and making effective rules and regulations pursuant to 5 M.R.S.A. § § 2351 and 2352 of the Administrative Code would not conflict with any provision of liquor laws under Title 28.

We have examined Title 28 with particular reference to 28 M.R.S.A. § 55 which sets forth the powers and duties of the Liquor Commission. 28 M.R.S.A. § 55, subsection 1, provides, inter alia, that the Commission shall, " . . . . make such rules and regulations as they deem necessary for such purpose and to make rules and regulations for the administration, clarification, carrying out, enforcing and preventing violation of all laws pertaining to liquor which rules and regulations shall have the force and effect of law, unless and until set aside by some court of competent jurisdiction or revoked by the commission."

28 M.R.S.A. § 55, subsection 8, gives the Commission power "To adopt rules, requirements and regulations, not inconsistent with this Title or other laws of the State, the observance of which shall be conditions precedent to the granting of any license to sell liquor, including malt liquor."

28 M.R.S.A. § 55, subsection 12, requires the Commission, "To publish at least

annually on or before August 31st in a convenient pamphlet form all regulations then in force and to furnish copies of such pamphlets to every licensee authorized by law to sell liquor."

The aforementioned three subsections of section 55 are the subsections dealing with rules and regulations. These three subsections do not conflict with 5 M.R.S.A. § 2351 or § 2352, as these three subsections do not in any way establish the manner in which the rules shall be adopted and how and when the rules shall become effective.

It is our conclusion, on the basis of the examination of Title 28, that no procedures have been established by that Title for the promulgation of rules and regulations and, therefore, the procedures set forth in 5 M.R.S.A. § § 2351 and 2352 of the Administrative Code are the procedures to be followed by the Liquor Commission for the promulgation of rules and regulations.

In view of the foregoing the rules and regulations filed with the Secretary of State on April 6, 1966 are the effective rules and regulations adopted by the Liquor Commission and all subsequent amendments and additions to, or repeal of, those rules and regulations are not legally effective at this time.

QUESTION NO. 2:

Does the Liquor Commission have direct authority over the Enforcement Division of the Liquor Commission?

ANSWER:

Yes.

OPINION NO. 2:

Although it is true that 28 M.R.S.A. § 55, subsection 14 states in part, " . . . . The inspectors shall be under the direct supervision and control of the chief inspector . . . . " our legislature did not have to state the obvious fact that the chief inspector shall be under the direct supervision and control of the Liquor Commission. The Liquor Commission appoints the chief inspector and could for cause, under the Personnel Law, discharge the chief inspector. The Liquor Commission, through its direct control of the chief inspector has direct authority over the Enforcement Division. The Liquor Commission is charged with the general supervision and administration of all liquor laws and the Enforcement Division, which is a subordinate branch of the Liquor Commission, assists the Liquor Commission in the manner and to the extent required by the Commission, but in no event exceeding the authority granted the division by 28 M.R.S.A. § 55, subsection 14.

Very truly yours,

JAMES S. ERWIN
Attorney General

March 1, 1968

Major-General E. W. Heywood
Adjutant General
Parker Hennessey, Chief
State Police

Suppression of Civil Disturbances

You have asked several questions in connection with the suppression of civil disturbances by military forces of the State.

The first question relates to the circumstances under which the Governor is authorized to order to active service the National Guard or the militia. It should be borne in mind that the word "militia" is an all-inclusive word. By 25 M.R.S.A. § 761, it is divided into these classes: The National Guard, the naval militia, other organized militia units and the unorganized militia. 25 M.R.S.A. § 703 provides:

> "In case of insurrection, invasion, tumult, riot, mob or body of men acting together by force with intent to commit a felony, or to offer violence to persons or property, or by force and violence to break and resist the laws of this State or the United States, or of imminent danger thereof, or in the event of public disaster resulting from flood, conflagration or tempests, the Governor shall have the power to order into the active service of the State or in aid of any civil authority the National Guard or other authorized State military or naval forces or any part thereof that he may deem proper."

As for the unorganized militia, they may be ordered out only when the National Guard is ordered into federal service, and the number available is insufficient to meet the federal call. See 25 M.R.S.A. § 703.

It is our opinion that unless one of the conditions listed in 703 exists, the Governor does not have the power to order the National Guard or the militia into active service for the suppression of civil disturbances.

The next question concerns the issuance of an emergency proclamation in the absence of the Governor from the State. 25 M.R.S.A. § 307 provides that in such case the person who can do so is the person who would act as Governor if the office of Governor were vacant.

In descending order, these are:

President of the Senate
Speaker of the House of Representatives
Secretary of State

(See Constitution, Article V, Part 1, section 14)

You next ask what powers of arrest members of the National Guard and private citizens have.

When there is an unlawful assembly, 17 M.R.S.A. § § 3355 and 3356 provide that private citizens may be called upon to aid the officers, whose duty it is to disperse the assembly, in arresting and securing the persons composing it.

§ 3356 provides that when an armed force is called out it shall obey the orders for suppressing such assembly, and arresting and securing the persons composing it which it receives from the Governor, any justice or judge of a court of record, the sheriff of the county, or any 2 of the officers mentioned in § 3355 (municipal officers, constables, marshal, deputy marshal and police officers, and the sheriff and his deputies).

LEON V. WALKER, JR.
Assistant Attorney General

March 7, 1968
Mental Health and Corrections

Walter F. Ulmer, Commissioner

Legality of Premature Establishment and Operation of Bureau of Mental Retardation.

FACTS:

The 103rd Legislature of the State of Maine, at the Special Legislative Session held January 9 – 26, 1968, enacted legislation for the purpose of establishing the Bureau of Mental Retardation. *P. L., 1967, c. 535.* The reference measure adds a new chapter to Title 34 of the Maine Revised Statutes, i. e., Chapter 184. (It is noted that the effective date of the Act is July 1, 1969.)

> " § 2061. Bureau of Mental Retardation. The Department of Mental Health and Corrections shall be responsible for the direction of mental retardation programs in the institutions of the department and shall be responsible for the planning, promotion, coordination and development of a complete and integrated state-wide program for the mentally retarded and shall serve as liaison, coordinator and consultant to the several state departments in accomplishing the provision of such comprehensive service. There is created within the department a Bureau of Mental Retardation to carry out these responsibilities."

Your memorandum recites that the Governor has designated the Department of Mental Health and Corrections as the Mental Retardation Planning and Plan Implementation Agency for the State of Maine.

QUESTIONS:

1. Does *P. L., 1967, c. 535* limit the Department of Mental Health and Corrections in establishing, within its administrative structure, a section on mental retardation which would later become the Bureau of Mental Retardation as defined in Chapter 535?

2. Would the premature establishment of some type of organizational mechanism to handle mental retardation problems be contrary to the intent of P. L., 1967, c. 535, i.e., that organization be established on and after July 1, 1969?

ANSWERS:

1. No.
2. No.

REASON:

P. L., 1967, c. 535 does not limit the Department of Mental Health and Corrections re establishment of a section on mental retardation for the reason that the provisions of chapter 535 are not presently operative and are not, for that reason, applicable. Too, any premature establishment of "some kind" of department organization for the purpose of processing mental retardation problems would not be contrary to the intent of chapter 535. The legality of the premature establishment of "organizational mechanisms" in the Department of Mental Health and Corrections must be rested upon existing Maine law.

In our view, the language in 34 M.R.S.A. § 2001 defining the purpose for the creation of the Bureau of Mental Health is sufficiently broad as to encompass the present

establishment of administrative procedures to be utilized to handle mental retardation problems; provided, of course, that both funds and personnel are available.

JOHN W. BENOIT
Assistant Attorney General

March 7, 1968
University of Maine – Orono

Jay Bryant, Producer-Director

Town Meeting and Right of Privacy

FACTS:

It is proposed that the Maine Educational Television Network Televise a town meeting live.

QUESTION:

Whether a town meeting is a "public" event, in the sense that persons who participate in it are, by that fact, abrogating their rights to privacy for the period of the meeting.

OPINION:

Yes, to a limited extent.

REASON:

A town meeting exists for the purpose of accomplishing both legislative and executive functions. The powers of the town are exercised by vote of a town meeting *Pollard v. City of Norwalk,* 142 A. 807, 108 Conn. 145; *In re Opinion of the Justices,* 154 A. 647, 51 RI 322. The qualified inhabitants of a town must meet, deliberate, act, and vote in their natural and personal capacities if the corporate powers of the town are to be exercised.

The public does have an interest in knowing of most events which occur at a town meeting and certainly of those events which can be said to be truly public in nature. However, there can be no guarantee that the telecasting of those events would not result in litigation being brought against the Network.

Generally, a person's right of privacy is waived (as to publicity of public events) by his participation in the particular public event.

GARTH K. CHANDLER
Assistant Attorney General

March 8, 1968
Labor and Industry

Marion E. Martin, Commissioner

Authority of Commissioner of Labor and Industry to Enter into Reciprocal Agreements with other States.

FACTS:

The Legislature of the State of Arkansas enacted legislation which authorized its Commissioner of Labor to enter into reciprocal agreements with other states for assistance and cooperation in enforcing and implementing laws and projects relating to the field of labor. By correspondence under date of January 25, 1968, the Commissioner of Labor of the State of Arkansas has inquired whether the State of Maine, acting through its Commissioner of Labor and Industry, would be desirous of entering into a reciprocal agreement governing the collection of wages and other related labor matters of mutual interest between the two states.

QUESTION:

May the Commissioner of Labor and Industry, on behalf of the State of Maine, enter into a reciprocal agreement with the Commissioner of Labor of the State of Arkansas, which agreement provides for mutual assistance in the collection of wage claims and other related labor matters?

ANSWER:

No.

OPINION:

The Commissioner of Labor and Industry of the State of Maine cannot enter into reciprocal agreements with other states absent statutory authority to do so. The law is rather clear that the legislative body of a given state must authorize the execution of reciprocal agreements or contracts with other states.

The general law relative to interstate agreements is summarized in 81 C.J.S. (States) § 10 page 905 and reads in part as follows:

> "Generally, contracts between states are made by the acts of their legislatures. In so doing, no technical terms need be used; any terms are sufficient which would give rise to a contract between a state and an individual.
>
> " . . . . Without reference to the constitutional authorization of compacts between states, *it has been held that a statute may authorize an administrative official to enter into reciprocal agreements with authorities of another state with respect to certain matters,* and that an agreement made pursuant thereto is valid if it does not conflict with the laws of the state." (Emphasis supplied)

It might be well for the State of Maine to empower the Commissioner of Labor and Industry with authority to enter into reciprocal agreements with the various states relative to such matters as wage collections. This is strictly a decision for the Legislature to determine, however.

PHILLIP M. KILMISTER
Assistant Attorney General

March 8, 1968
Treasury

Michael A. Napolitano, Treasurer

Legality of Participation in Repurchase Agreements Under the Authority of 5 M.R.S.A. § 135.

FACTS:

The opinion of this Department has been requested as to whether or not excess moneys in the State Treasury may be invested pursuant to a so-called repurchase agreement. Apparently such an investment is often placed through a middle man, such as a bank, and the loan is usually made to a dealer in investments who usually needs money to purchase securities and who will pledge United States securities as collateral.

5 M.R.S.A. § 135 states in part as follows:

> "When there are excess moneys in the State Treasury which are not needed to meet current obligations . . . (the treasurer) . . . may, with the concurrence of the State Comptroller or the Commissioner of Finance and Administration and with the consent of the Governor and Council, invest such amounts in bonds, notes, certificates of indebtedness or other obligations of the United States of America which mature not more than 24 months from the date of investment. . . " (Emphasis and parenthesis supplied.)

QUESTION:

May excess moneys in the State Treasury be loaned to dealers in investments, or other parties, in accordance with the terms of a "repurchase agreement" under 5 M.R.S.A. § 135?

ANSWER:

No.

REASON:

Title 5 M.R.S.A. § 135 is quite specific in that excess moneys in the State Treasury may only be invested in United States of America obligations. Under a so-called "repurchase agreement", the investment, or loan, would be made to a party other than the United States of America and United States securities would be used as collateral to secure the loan. Under this latter situation, the moneys involved are not invested in an obligation of the United States of America. Consequently, an investment under a "repurchase agreement" would not be authorized by the aforementioned statute.

HARRY N. STARBRANCH
Assistant Attorney General

March 11, 1968
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Tape Recordings Sold on a Subscription Basis

FACTS:

The "Surgery Digest", published by Audio Digest Foundation, is published on magnetic tapes rather than being reduced to printed form.

The "Surgery Digest" is issued every two weeks at an annual subscription cost. Dated tapes are mailed to the subscriber together with a printed table of contents. The tables of content are filed in a loose-leaf binder so that future reference can be made to the content of the magnetic tapes. The tapes contain a variety of articles by different authors devoted to different aspects of surgery.

QUESTION:

Does the sales tax exemption for publications, Title 36 M.R.S.A. § 1760 (14), apply only to printed publications or also to tape recordings?

ANSWER:

The exemption is not limited to printed publications and may also be applied to tape recordings.

LAW:

"No tax on sales, storage or use shall be collected upon or in connection with:

****

Sales of any publication regularly issued at average intervals not exceeding 3 months." Title 36 M.R.S.A. § 1760 (14).

REASONS:

Although normally a "publication" is thought to involve printed matter the question is whether by definition the word also includes tape recordings.

> " 'A publication is something, as a book or print, which has been published, made public or known to the world; and a writing, as well as a printing may be published.' "

We have previously ruled that "publication" as used in the above mentioned statute may be fairly interpreted to mean the same as "periodical". (See opinion of June 12, 1963).

A leading case on the determination of the meaning of "periodicals" is *Business Statistics Organization v. Joseph,* (N.Y., 1949) 87 N.E. 2d 505.

In that case since the meaning of the word periodical was not defined in the statutory or decisional law of the state, as is the case here, the Court said that it would adopt a test of the common understanding of the meaning of the word.

(Our Court has followed a similar procedure in determining the meaning of words used in the Sales & Use Tax Law. See *Androscoggin Foundry vs. Johnson,* 1952, 147 Me.

452, 456 and *Camp Walden v. Johnson,* 1960, 156 Me. 160, 165).

The Court in Business Statistics stated the meaning of the word "periodical" in the following language (citing *Houghton v. U.S.* 194 U.S. 88 at 97):

> " 'A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel or essays upon subjects pertaining to general literature***' " *Business Statistics Organization v. Joseph,* supra at p. 508.

The court also went on to explain the meaning of the word "literature" when used in the statutory context:

> ". . . . 'literature' in this context means 'no more than productions which convey ideas by words, pictures, or drawings' ". (Citing *Hannegan v. Esquire, Inc.,* 327 U.S. 146, 153, 66 S. Ct. 456, 460, 90 L. Ed.) *Business Statistics Organization v. Joseph,* supra at p. 508.

It is the sense of the meaning of the word as used in the statute that a "publication" or "periodical", as literature, is something that conveys ideas by words, pictures or drawings. Too, a "publication" or "periodical" appears at regular intervals, contains a variety of articles relating to a particular class of subjects and implies a continuity of literary character. Therefore, a tape recording, of such information is as much a periodical as is a printing containing the same information.

So long as the tape recording contains information within the above definition and it is published at regular stated intervals within the statute, it would be exempt.

In this case "Surgery Digest" is published at regular stated intervals, it contains a variety of original articles by different authors; they are devoted to a special class of subjects, they are incomplete in and of themselves and indicate a relation to prior and subsequent issues and they have a continuity of literary character.

"Surgery Digest" tape recordings issued at two week intervals should be considered exempt publications within the meaning of Title 36 M.R.S.A. § 1760 (14).

JON R. DOYLE
Assistant Attorney General

March 13, 1968
Water and Air Environmental
Improvement Commission

George Gormley, Civil Engineer

Drainage of Sanitary Sewage into Wetlands under Jurisdiction of Wetlands Control Board.

FACTS:

A municipality proposes to drain sanitary sewage from a treatment plant onto wetlands bordering coastal waters.

QUESTION:

Must the municipality comply with the provisions of Me. Rev. Stat. Ann., Tit. 12, § § 4701-4709 (Supp. 1967)?

ANSWER:

Yes. Sections 4701-4709 apply in terms to municipalities. The municipality in question will have to receive clearance from the Wetlands Control Board and from the officers of the municipality where the proposed drainage will take place prior to actual operation.

ROBERT G. FULLER, JR.
Assistant Attorney General

March 14, 1968
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Allowances to Retail Gasoline Dealers for Shrinkage Losses

FACTS:

The State Tax Assessor has received refund applications for shrinkage or loss by evaporation, in good order, from two retail gasoline dealers who presently owe the State of Maine sums as licensed dealers under the Use Fuel Act. In one case, the dealer owes both tax and penalties, the total amount exceeding the amount of the refund claim; in the other case, the dealer owes penalties only in an amount less than the refund claim.

There is no general statutory provision permitting off-setting amounts due the State from refunds.

QUESTION:

May the State Tax Assessor apply the amount of refund to which the applicant would otherwise be entitled, to the amount of tax and/or penalty due the State by the applicant, before paying the balance, if any, to the applicant?

LAW:

"****

. . . any retail dealer shall be entitled to a refund for tax paid on account of shrinkage or loss by evaporation of motor fuel. The procedure for such refund shall be as follows:

****

The conditions of subsections 1 to 3 having been fully complied with, the Tax Assessor shall calculate the amount of the refund due on such application and shall certify such amount and the name of the person entitled to the refund to the Treasurer of State. The Treasurer of State shall thereupon make such certified refund from said road taxes." Title 36 M.R.S.A. § 2906.

ANSWER:

No.

REASON:

The above applicants are licensed as Use Fuel Dealers. They have submitted reports stating the number of gallons of fuel received, sold, and used in the State by them during the preceding calendar months on forms furnished by the State Tax Assessor as directed by Title 36 M.R.S.A. § 3035. Thus, the respective amounts of Use Fuel Tax owed are liquidated. The refunds owed to these retail gasoline dealers are also liquidated.

Since we are dealing with liquidated amounts, one due and one payable, we must determine whether or not the State of Maine could set-off or counterclaim the use fuel taxes due against the refund due.

Generally, neither the State nor the debtor-taxpayer may set-off amounts owed against those due.

> "Taxes are not the subject of set-off either on behalf of the State or municipality for which they are imposed, or of the collector, or on behalf of the person taxed, as against such State, municipality or collector." *Cooley on Taxation,* 45th Ed., Section 22. (See also 80 C.J.S. *Set-Off and Counterclaim* § 47).

Nevertheless, set-off is often specifically permitted by statute:

> "In an action for taxes, set-off of an indebtedness of the State or municipality to the tax debtor will not be allowed, the statutes of set-off being construed in the light of public policy as not allowing the remedy in proceeding for this purpose unless expressly authorized. . . However, a set-off against taxes may be allowed by statute, in the absence of a constitutional prohibition. . . " 80 C.J.S. *Set-Off and Counterclaim,* Section 20.

One should note that counterclaims for unpaid taxes are specifically authorized to cities and towns by Title 14 M.R.S.A. § 5901. However, as regards the issue presented here, the State has been given no specific or general statutory right to set-off the amount of tax owed to the State.

The case of *Drummond, et al vs. Maine Employment Security Commission,* 157 Me. 404, 410, although not on point, does indicate that refund provisions are strictly construed by courts: "The results arrived at in this opinion are predicated on the established law in this State that taxes voluntarily paid cannot be refunded unless the statute so provides."

The Court quotes from 84 C.J.S., *Taxation,* § 632a(1):

> ". . . In the absence of statutory authority, no executive or administrative officer or board has power to refund taxes; and, if the power, is given to him or it by law, it must be strictly followed."

In view of the above, the refund must be paid, if otherwise in conformity with the statutory provisions. The amounts due from the taxpayer should be enforced through the customary procedure.

WENDELL R. DAVIDSON
Assistant Attorney General

March 20, 1968
Secretary of State

Stanley F. Hanson, Jr., Deputy

Registration of Voters in Indian Voting Districts

The question which Commissioner Hinckley of the Department of Indian Affairs has asked of you, is basically the following:

QUESTION:

May a Reservation Chaplain who resides on a Reservation register and vote in an Indian Voting District?

ANSWER:

No.

OPINION:

In an opinion of this office rendered on September 6, 1955 it was held that white persons and Indians who were non-citizens could not vote on the respective reservations. The wording of subsections 4 and 5 of section 1622 of Title 21 of the Revised Statutes (Indian Voting District Law) leads to an affirmation of this opinion.

It is true that the statutory language of subsection 4, standing alone, is clearly broad enough in scope to include the registration of all residents duly qualified to vote, whether they be Indians or not. Subsection 5 designates rather clearly that the registration commissioner of each Indian voting district shall register only "Indian voters", however.

Reading subsections 4 and 5 conjunctively, we believe the Legislature did not contemplate the registration of non-Indian voters within Indian voting districts.

PHILLIP M. KILMISTER
Assistant Attorney General

March 28, 1968
Water and Air Environmental
Improvement Commission

George C. Gormley, Civil Engineer

Eligibility of Pleasant Point Passamaquoddy Reservation Housing Authority for WAEIC aid under 38 M.R.S.A. § 411 (1964).

FACTS:

The Pleasant Point Passamaquoddy Reservation Housing Authority created by 22 M.R.S.A. § 4733 (Supp. 1968) proposes to construct a pollution abatement facility. The Authority has received federal approval of its proposed project and federal funds in aid of construction. The Authority now applies to the Water and Air Environmental

Improvement Commission for additional funds believed available under the provisions of 38 M.R.S.A. § 411 (1964). Such funds are available to federally approved and funded quasi-municipal pollution abatement construction programs. 22 M.R.S.A. § 4738 (Supp. 1968) empowers the State to grant funds to Indian housing authorities.

QUESTIONS:

1. Is the Authority's pollution abatement program a "quasi-municipal" program eligible for WAEIC aid under 38 M.R.S.A. § 411 (1964)?

2. Do the provisions of 22 M.R.S.A. § 4738 (Supp. 1968) restrict the source of state funds for the Authority to those funds which have been specifically appropriated and earmarked by the Legislature for the Authority, or may the Authority also tap the state funds available under 38 M.R.S.A. § 411 (1964) if its pollution abatement program is otherwise qualified for such aid?

ANSWERS:

1. Yes. The Authority is by statute a "public body corporate and politic." 22 M.R.S.A. § 4733 (Supp. 1968). The language of 22 M.R.S.A. § 4732 (Supp. 1968) clearly indicates that Indian housing authorities were intended to be, in the language of a North Dakota court, "public corporation(s) for public purposes." *Ferch v. Housing Auth. of Cass County,* 79 N. D. 764, 59 N. W. 2d 849, 865 (1953). Further, as was well put by a New York Court, "(t) he very name, authority, given to this type of public corporations imports a distinct historical connotation of separateness and judicial distinction from the State and from . . . municipal corporations. . . ." *Ciulla v. State,* 191 Misc. 528, 77 N.Y.S. 2d 545 (1948).

We conclude that the pollution abatement programs of the Authority may be considered as "quasi-municipal" for the purposes of applying 38 M.R.S.A. § 411 (1964).

2. We do not believe that the language of Title 22, § 4738 was intended to bar the Authority from an award of WAEIC funds under Title 38, § 411. Section 4738 is not a restrictively worded section. It might be well to quote the pertinent portion of the section at this point:

> "In addition to its other powers, the State is empowered to provide facilities, services and financial aid, by loan, donation, grant, contribution and appropriation of money; or by any other means, to an authority . . . . "
>
> Reading this section in conjunction with section 4732, it is clear that the aim of the Maine Indian Housing Authorities Act was to relieve the abysmal housing conditions existing on the Indian reservations, and to employ state funds to pursue this aim. Section 4738 was not intended to limit the source of such funds, but rather to make clear in general terms that the State would finance and otherwise aid the Indian housing authorities. In this regard, it might be well to quote Holmes: "The general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *International Stevedoring Co. v. Haverty,* 197 U. S. 135 (1905). It would seem inconsistent with the purpose of the Act, plainly expressed in section 4732, to find that section 4738 limits the State funds available to the Authority to those which have been specifically appropriated for it. If the Authority can qualify, as any other quasi-municipal corporation may qualify, through the WAEIC for state aid in the form of funds allocated by the State for distribution by the WAEIC to qualified quasi-municipal pollution abatement

programs, there seems to be no good reason why the mere fact that other state aid is also available should bar the Authority from a section 411 award.

ROBERT G. FULLER, JR.
Assistant Attorney General

April 4, 1968
Education

Hayden L. V. Anderson, Executive
Director, Div. of Professional Services

Proposed Employment of Commission Member by Study Group Employed by Commission.

FACTS:

The State Board of Education acting as the Maine State Commission for the Higher Education Facilities Act of 1963, (sometimes referred to hereafter as the "Commission"), pursuant to the provisions of P. L. 1967, c. 292 (20 M.R.S.A. § § 2720-2721), is preparing a contract with the Institute for Educational Development, a non-profit, non-stock New York corporation, for the purpose of securing a study of Maine's higher education institutions under the comprehensive planning grant program of the Federal Act.

Presently, the New York corporation is in the process of recruiting Maine people to supplement the corporation's out-of-state staff; and the corporation has indicated a desire to employ Mrs. Jean Sampson of Lewiston as a consultant on a day-to-day basis at a fixed fee per day. Mrs. Sampson is willing to accept such an assignment. Presently, Mrs. Sampson is a member of the State Board of Education.

QUESTION:

Whether or not a member of the State Board of Education acting as the Maine State Commission for the Higher Education Facilities Act of 1963 may be employed by a study firm which will contract with the State Board, without creating a conflict of interest?

ANSWER:

If the given employment takes place, a conflict of interest will result.

REASON:

The Commission referred to in the given facts is, together with the aforementioned New York entity, presently preparing a contract in which the New York corporation will undertake a planning study for presentation to the State. So far, the subject Commission member is only involved with one side of that contract, i.e., as a member of the Commission hiring the New York entity in order to secure planning services. When such member becomes employed by the New York entity, remuneration will be paid the member by the New York entity; and by reason of that fact, the member would possess positions of interest on both sides of the contract simultaneously.

(*NOTE:* Because the contract is still in the drafting stage, this office has not been

presented with the proposed terms of the contract in order to learn the extent of supervision which will be exercised over the New York entity by the Commission.)

Unless the contract is completely silent regarding the Commission's supervision over the planning firm (and we cannot envision that the New York entity would not be answerable to the Commission under the terms of the contract), "incompatibility of offices" would result from the stated facts. The common law doctrine of "incompatibility of offices" is expressed in *Howard v. Harrington,* 114 Me. 443, 96 A. 769. (In citing *Howard v. Harrington,* supra, we do not borrow the facts of that case; but, do borrow the expressed doctrine and the reasoning advanced in support of the doctrine.) Clearly, a conflict of interest exists from a situation where, on the one hand, a person sits in a supervisory capacity while, at the same time, holding a position calling for the performance of work subject to that supervision.

In a recent opinion by this office, dated February 15, 1968, we determined that the appointment of an employee of a State college to the State Board of Education would constitute a violation of the common law doctrine of "incompatibility of offices." The facts of that opinion are parallel to the facts given here; and certain of the language there is applicable in this opinion:

> "It has been generally decided that the inconsistency, which at common law renders offices incompatible, does not accrue by reason of the physical impossibility to discharge the duties of both offices; but lies, instead, in a conflict of interest, such as when one office is subordinate to the other, and is subject in some degree to the supervisory power of the other. *Russell v. Worcester County,* 232 Mass. 717, 84 N.E. 2d 123; *In Re Opinion of the Justices,* 61 R.I. 197, 21 A. 2d 267 * * *."

Your attention is directed to the provisions of 17 M.R.S.A. § 3104 which provides, among other things, that: "No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the state, * * * shall be pecuniarly interested directly or indirectly in any contracts made in behalf of the state * * * in which he holds such place of trust, and any contract made in violation hereof is void * * *." The Maine Supreme Judicial Court, in *Lessieur v. Rumford,* 113 Me. 317, 93 A. 838 and *Opinion of the Justices,* 108 Me. 545, 82 A. 90, states that the instant section clearly indicates that it is the policy of the State that persons, whom the law has placed in positions where they may make, or be instrumental in the making, or in superintending the performance of, contracts in which others are interested, should not themselves be personally interested in such contracts.

JOHN W. BENOIT
Assistant Attorney General

April 4, 1968

State Retirement System

Pension Plans under 5 M.R.S.A. § 1121, sub. 4A

SYLLABUS:

A State Prison Guard seeks ½ pay retirement benefits under 5 M.R.S.A. § 1121 sub. 4A. For this he must have 25 years service in "his respective capacity." Time spent on the Rockland Police Force before he became a Prison Guard qualifies under this section as being in "his respective capacity."

FACTS:

A guard at the Maine State Prison began work as a guard on May 12, 1946. He has worked as a guard at the State Prison continuously since that date. Before that time, he had no State service.

He worked as a policeman for the City of Rockland for seven and one-half years, before Rockland became a participating district. For his time spent on the Rockland Police Force he has been granted no credit by the State Retirement System.

He entered active military service (Army) on January 27, 1944, and was separated December 2, 1945. For his active Army service, the State Retirement System has granted him a military service credit of one year, ten months, and six days.

He has paid contributions for the time granted him for this active Army service. He has paid nothing for the time spent on the Rockland Police Force.

This guard wishes to retire very soon and would like to qualify for the retirement benefits under 5 M.R.S.A. § 1121, sub. 4A.

QUESTION:

Whether this prison guard can qualify for benefits under 5 M.R.S.A. § 1121, sub. 4A.

ANSWER:

Yes.

OPINION:

5 M.R.S.A. § 1121, sub. 4A reads as follows:

" A. Any member who

(1) was a member on July 1, 1947 and is the deputy warden, the captain of the guard, or a guard of the State Prison or

(2) Is an airplane pilot employed by the State of Maine; or a member of a fire or police department including the chiefs thereof and sheriffs and deputy sheriffs, and, in any case, *who has at least 25 years of creditable service in his respective capacity,* may be retired on or after the attainment of age 55 on a service retirement allowance." (emphasis supplied)

The military service credit which this guard received was granted under 5 M.R.S.A. § 1094, sub. 13 which reads as follows:

"Anything to the contrary notwithstanding, military service shall be credited to all state employees who are unable to otherwise qualify for military service credits. A state employee shall be entitled to this credit only if at point of retirement he shall have at least 15 years of membership service in the State Retirement System. The member shall contribute to the retirement system for each year of military service claimed 5% of the earnable compensation paid such member during the first year of state employment subsequent to service in the Armed Forces. Credit for military service under this subsection shall be limited to 4 years. Such credit shall be available to those persons who were separated under conditions other than dishonorable from the Armed Forces of the United States.

It is the intent that these provisions shall apply to all persons, active or retired, but that for those already retired the effective date of any adjustment shall be not

earlier than that date on which such time or credit is certified to the Maine State Retirement System."

In accordance with an opinion of the Attorney General, dated July 20, 1966, which holds that military service credit should be allowed toward the purchase of retirement for special groups, this credit was granted under section 1121, sub. 4A.

The service rendered to the Rockland Police Department should also be credited under 5 M.R.S.A. § 1211, sub. 4A consistent with an opinion of the Attorney General, dated March 8, 1963, which holds that an individual qualifies for this type retirement if he holds one or more in combination of the jobs enumerated therein. Since the job of a policeman is one of the jobs enumerated in this section, this time should qualify.

As the total time which should be credited this guard is more than twenty-five years, he would qualify under 5 M.R.S.A. § 1121, sub. 4A for a special retirement. Of course, he must pay back contributions for his police duty with the City of Rockland in order to make his twenty-five years.

WARREN E. WINSLOW, JR.
Assistant Attorney General

April 4, 1968
State Police

Major Ralph E. Staples, Deputy Chief

Application of longevity pay increases to the pensions of retired State Police Officers and their surviving widows.

FACTS:

In your memorandum under date of March 11, 1968 you have formally requested a review of an opinion of this office dated December 18, 1963 which held that retired State Police Officers are not entitled to an increase in retirement pay based upon longevity compensation authorized by the Legislature to be paid to active members of the State Police. Contingent upon a reversal of our 1963 ruling in regard to the applicability of longevity pay increases to retired State Police Officers, you have asked an additional question relative to the applicability of such longevity pay to retirement benefits payable to the surviving widows of retired State Police Officers. Basically the two questions which you pose may be stated as follows:

QUESTION NO. 1:

Are State Police Officers retired prior to the date of enactment of the statute authorizing longevity pay to active members of the force, entitled to an increase in their retirement pay based upon longevity pay authorized by such legislation?

QUESTION NO. 2:

Are widows of retired State Police Officers, who enlisted prior to July 9, 1943, entitled to an increase in their survivor benefit payments based upon longevity pay applicable to active State Police Officers?

ANSWERS:

We answer both questions in the affirmative.

OPINION:

In an opinion of this office dated December 18, 1963 regarding the application of longevity pay to retired State Police Officers in Maine, the final paragraph reads as follows:

> "Longevity is, therefore, a recognition personal to an individual for his personal length of service. It, therefore, follows that it does not increase the salary of a specific position or grade. Hence, it cannot be considered for the purpose of increasing a retired state police officer's pension."

We do not feel constrained to adhere to the conclusion that longevity pay cannot be considered in increasing the over-all retirement base pay of a retiree.

There exists a split of authority as to whether longevity payments should be included in determining retirement allowances of pensioners retired prior to the enactment of statutes which provide additional compensation for public employees based upon length of service.

The landmark case of *Leitch v. Gaither,* 151 Md. 167, 134 A. 317 annotated in 118 A.L.R. 992 has never been overruled and holds that:

> "Salaries paid to retired members of a police force are to be computed upon base pay of active members of the force, and not upon salary plus additional allowance for length of service."

However, since the date of our opinion (December 18, 1963) we denote that the modern trend of court interpretation is to include "length of service" or "longevity" payments as part of the salary attached to the rank or position of retired public employees and to include same as part of the over-all salary base upon which to compute retirement payments.

> " 'Longevity' and 'merit' pay constitute part of 'salary attached to the rank or position' formerly held by retired or deceased members of city police and fire departments for purpose of computing fluctuating pensions to be paid to members or to their widows." *Abbott v. Los Angeles,* 178 Cal. App. 2d 204, 3 Cal. Rptr. 127.
>
> "Under municipal pension plan retired firemen and widows were entitled to receive pension payment based on basic monthly salary and longevity payment." *Kilfoil v. Johnson,* (Ind. App.) 191 N. E. 2d 321.

A brief factual resume' of the statutes upon which you base your questions may be stated as follows: In 1951 the Maine Legislature provided that retired members of the State Police shall receive one-half of the pay per year that is presently payable to members of their respective grade presently in service. (P. & S. 1951, c. 214, as amended by P. & S. 1953, c. 166) Twelve years later the Legislature enacted a statute (P. & S. 1963, c. 202) which provided for longevity payments to state employees "applicable to pay checks dated on or after January 1, 1964." The Legislature in no manner indicated that such "length of service payments" should apply to any group of state employees in a retired status however.

Pension laws are to be liberally construed in favor of those intended to be benefitted thereby. *Kilfoil v. Johnson,* supra. Although the longevity statute is not a pension law per se it is part and parcel of same. The State Police Officer of today is entitled to have longevity pay computed as part of his salary. Such pay attaches to the salary of his rank

or position. Since a retired state police officer is entitled to one-half of the pay per year that is presently payable to a member of the rank or grade which he held at the time of his retirement, it logically follows that this should include one-half of all of the pay which attaches to said rank or position.

We believe that the state police officer who retired prior to the enactment of the "longevity statute" is entitled to retirement pay based upon years of service in the same manner as his counterpart in active service who retires after the enactment of said longevity statute. To hold otherwise is to perpetrate an inequity upon those state police officers who retired prior to 1964.

It is inconsistent policy for the legislature to clearly evince an intention in P. S. 1951, c. 214 to equate the retirement pay of retirees as nearly as possible to the increased cost of living by providing that all retirees shall be entitled to one-half pay of active state police officers of their same rank, and later in time, to deny said retirees by implication, an increase in retirement pay based upon longevity.

In regard to the second question submitted our answer is based upon the same reasoning which leads to an affirmative conclusion to the first question.

P. L. 1965, c. 387, as amended by P. L. 1967, c. 454 provides as follows:

> "A surviving widow shall be paid ½ of the amount that any member of the State Police, including the Chief of the State Police, is receiving either as a pension or a disability retirement allowance under this chapter, and said payments shall continue for the remainder of her lifetime or until she should remarry. Payments to the member shall cease as of the day of his death and shall begin to his widow on the following day.
>
> "This section shall apply to a surviving widow of any member of the State Police who at the time of his death had been eligible to or receiving a pension or a disability retirement allowance under this chapter. *Payments to those who were surviving widows on September 3, 1965 shall be based upon the amount of pension or disability retirement that said member would have been entitled to receive as of September 3, 1965 under this chapter.*" (Emphasis supplied)

As indicated by the above-italicized statutory language, it is immaterial when the retiree died. The surviving widow's retirement allowance is to be computed upon the amount of retirement pay which her husband would have been entitled to receive had he lived until September 3, 1965.

PHILLIP M. KILMISTER
Assistant Attorney General

April 5, 1968
Personnel

Willard R. Harris, Director

Status of Classified State Employees as Candidates for Offices Elected by the Legislature

SYLLABUS:

A state classified employee must resign from classified service before he can become a candidate for an office which is elected by the state legislature. This result is required under 5 M.R.S.A. § 679.

FACTS:

A state employee, presently in the classified service, wishes to become a candidate for an office which is elected by the State Legislature.

QUESTION:

Does a classified state employee have to resign from classified service before becoming a candidate for an office elected by the state legislature?

ANSWER:

Yes.

REASONS:

5 M.R.S.A. § 679 reads as follows:

"No officer or employee in the classified service of this State shall, directly or indirectly, solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution or political service, whether voluntary or involuntary, for any political purpose whatever from any officer, agent, clerk or employee of the State or from any person."

It was held in an opinion of this office dated March 8, 1962, that a person in the classified service is prohibited under § 679 from being a candidate for public office in a partisan election.

Consistent with this opinion, we find that a classified employee seeking an office elected by the state legislature would, either directly or indirectly, be soliciting or receiving a political service from legislators on becoming a candidate. This would violate 5 M.R.S.A. § 679. He must therefore resign from the classified service before becoming a candidate for this office.

WARREN E. WINSLOW, JR.
Assistant Attorney General

April 5, 1968

Honorable Joseph T. Edgar
Secretary of State

Honorable David H. Stevens
Chairman, Highway Commission

Colonel Parker F. Hennessey
Chief, Maine State Police

Gentlemen:

SYLLABUS:

29 M.R.S.A. § 1462 provides minimum standards for warning lights on State Highway Commission vehicles used in plowing and sanding public ways. § 1361 authorizes

Secretary of State to determine when a given light meets minimum standards.

FACTS:

Certain State Highway Commission vehicles used in plowing snow and sanding on public ways are neither equipped with"2 auxiliary lights" "at least 6 inches in diameter", nor in lieu thereof with "at least one auxiliary rotary flashing light having *4-inch sealed beams* and showing amber beams of light over a 360° range." (Emphasis supplied.) 29 M.R.S.A. § 1462. All State Highway Commission vehicles used in plowing snow and sanding on public ways are equipped with one or more auxiliary lights featuring 50 C.P. bulbs in fixed position around which rotate 360° three occular ground high magnification lenses delivering up to 10,000 candlepower and commonly called a "Whelen Light." The light unit is not a so-called "Sealed Beam."

Upon inquiry it is learned that the attempt to use 2 auxiliary lights at least 6 inches in diameter met with many complaints (which was acknowledged by the State Police) of inadequacy in stormy weather. The Commission resorted to sealed beams which proved equally inadequate. They were prone to chronic failure because sealed beam units available in rotary lights were not designed to resist vibration, shock, dust, moisture, corrosion and the general abuse subjected to the unit because of it being mounted on maintenance vehicles exposed to the severe conditions Maine winters have to offer, thus the complaints again were that the maintenance vehicles were not properly lighted.

QUESTION:

Is this installation on the Commission vehicles in violation of 29 M.R.S.A. § 1462?

ANSWER:

No, provided the Whelen Light equals or exceeds the minimum standards of 4-inch sealed beams or two lights 6 inches in diameter.

REASON:

A brief sketch of the historical background of 29 M.R.S.A. § 1462 sheds light on the intent of the legislature.

R. S. 1944, C. 19, § 34 was amended by P.L. 1945, C. 335, by adding a new section 34-A entitled "Public Safety with Snow Removal or Sanding Equipment Promoted", required auxiliary lights on vehicles used for plowing snow or sanding on public ways.

> "The light showing to the front shall be a blue light and at least 6 inches in diameter. The light showing to the rear shall be a red light at least 6 inches in diameter. These 2 lights shall be equipped with blinker attachments."

P.L. 1963, C. 147 amended R.S. 1954, C. 22, § 44 as follows:

> "All trucks, graders and other vehicles, while being used for the express purpose of plowing snow or sanding on public ways shall be equipped with at least 2 auxiliary lights to be mounted on the highest practical point on the vehicle, one showing to the front and one to the rear of the vehicle. The lights shall emit an amber beam of light and shall be at least 6 inches in diameter and shall be equipped with blinker attachments. In lieu of the lights hereinbefore specified, such vehicles may be equipped with at least one auxiliary rotary

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:
>
> ****
>
> 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

April 12, 1968
Executive

Allen Pease, Administrative Asst.

Interpretation of P. L. 1967, c. 542

SYLLABUS:

The words *adjust to no more than* when used in statute which fixes salaries means the terminal point toward which movement is made or projected and not the absolute amount to be fixed.

FACTS:

The Governor and Executive Council are presently considering study of the salaries as set forth in P. L. 1967, c. 542.

QUESTION 1:

Does the phrase "no more than" as used in P. L. 1967, c. 542 § 6 mean the maximum amount to which the salary could be raised or does it mean that the salary must be set equal to that amount?

ANSWER 1:

It means that the salary can be set at any figure up to and including that amount.

REASON 1:

The fundamental rule in construing legislative acts is to ascertain the intention of the legislature and give effect thereto. *Cloutier v. Anctil,* 154 A 2d 175, 155 Me. 300. The intention must be derived from the whole statute. P. L. 1967, c. 542 § 6 reads in pertinent part:

> Notwithstanding any other provision of law, the Governor, with the advice and consent of the Council, is *authorized* to *adjust* the salaries of the following (8 groups of) state officials and employees *to no more than* (various amounts). (emphasis supplied)

The words *authorized to adjust to no more than* must be given their ordinary signification. *State v. Harnum* 56 A 2d 449, 143 Me. 133. The second *to* in that phrase indicates the terminal point toward which movement is made or projected; as to adjust *to* the amount, *Webster's Third New International Dictionary, 2401.* By permitting adjustment toward the maximum amounts, the legislature permits the Governor and Council to fix the salaries according to their discretion and the Governor and Council *may* choose maximum amounts.

QUESTION 2:

Are salaries set under P. L. 1967, c. 542 to include longevity raises?

ANSWER:

Yes, when an official becomes entitled to it.

REASONS 2:

P. & S. 1963, c. 202 prescribes when an individual is eligible for one or two longevity steps. The increase authorized under P. L. 1967, c. 542 does not change longevity eligibility. If the recipient is presently receiving longevity consideration there is no reason or authorization to add additional longevity benefits. When an official, not now receiving longevity, becomes eligible he shall have it even though the increase will put him above the maximum salary set by statute.

GARTH K. CHANDLER
Assistant Attorney General

April 18, 1968
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Application of sales tax to sales of Naval oceanographic office navigation charts and publications

SYLLABUS:

THE HARRIS COMPANY, AS AN AGENT OF THE UNITED STATES GOVERNMENT FOR SELLING NAVAL AND OCEANOGRAPHIC OFFICE NAVIGATION CHARTS AND PUBLICATIONS, IS NOT REQUIRED TO COLLECT A SALES TAX ON SALES OF THESE ITEMS. HOWEVER, THE HARRIS COMPANY MUST COLLECT AND REMIT A USE TAX.

FACTS:

The Harris Company of Portland, hereinafter called the seller, is in the business of selling marine and yachting supplies, and is a registered seller under the Maine Sales and Use Tax Law. The seller sells Naval and Oceanographic Office navigation charts and publications as an agent or consignee of the United States Government. Title remains in the United States Government and at any time the United States Government may request the return of any and all of the charts and publications.

The Office of the General Counsel, Department of the Navy, has issued a directive to the effect that its sales agents are no longer authorized or required to collect state or local sales taxes on sales of these Naval Oceanographic Office charts and publications.

For the purposes of this opinion it is assumed that the Harris Company is an agent of the United States Government. However, at this time this office is not in possession of documented proof of the agency relationship.

QUESTION:

Is the seller responsible for collecting a use tax on the sales price of these charts and

publications under the Maine Sales and Use Tax Law?

ANSWER:

Yes.

LAW:

"A tax is imposed on the storage, use or other consumption in this State of tangible personal property, purchased at retail sale at the rate of 4½% of the sale price. Every person so storing, using or otherwise consuming is liable for the tax until he has paid the same or has taken a receipt from his seller, thereto duly authorized by the Tax Assessor, showing that the seller has collected the sales or use tax, in which case the seller shall be liable for it. Retailers registered under sections 1754 or 1756 shall collect such tax and make remittance to the Tax Assessor." Title 36 M.R.S.A. § 1861.

REASONS:

The seller is registered pursuant to 36 M.R.S.A. § 1754. Normally, the seller would be required to collect from the purchaser the applicable sales tax, however, being an agent of the U.S. Government, the seller cannot be compelled to collect and remit a sales tax. Nevertheless, these charts and publications are purchased at retail sale, and as a result, a use tax is due and payable on them, which the seller must collect and remit to the Tax Assessor. Title 36 M.R.S.A. §1861 states that "Retailers registered under section 1754 . . . shall collect such tax and make remittance to the Tax Assessor."

It should be noted that a sales tax is unenforceable because the incidence of the tax is on the retailer, who, on these facts, is an agent of the United States Government. *W. S. Libbey and Co. v. Johnson,* 148 Me. 410. However, the use tax is proper because the incidence of the tax is on the purchaser, not the retailer. *Northwestern National Bank of Sioux Falls v. Gillis,* 148 N. W. 2d 293; *Bank of America National Trust and Savings Asso. v. State Board of Equalization,* 26 Cal. Rptr. 348; Felt & Tarrant Co. v. Gallagher, 306 U.S. 62.

WENDELL R. DAVIDSON
Assistant Attorney General

April 25, 1968
Executive

Allen G. Pease, Administrative Asst.

Compatibility of Judge of Probate and Commissioner on Uniform State Laws

SYLLABUS:

The offices of Judge of Probate and Commissioner on Uniform State Laws are incompatible.

FACTS:

A Judge of Probate has been a Commissioner on Uniform State Laws for a number of years. His term of office has expired.

3 M.R.S.A. § 241 provides that a Commission of three members having terms of 4 years each shall be appointed by the Governor with the advice and consent of the Council.

Article VI, Section 5 of the Constitution reads:

"No Justice of the Supreme Judicial Court or any other court shall hold office under the United States or any other state, nor under this State, except as justice of the peace or as member of the Judicial Council."

QUESTION:

May a Judge of Probate legally be a Commissioner on Uniform State Laws?

ANSWER:

No.

REASON:

The Commissioner on Uniform State Laws is an "office . . . under this State." It does not come within the two exceptions, justice of the peace or Judicial Council. Hence, a judge of probate is not eligible for the office.

GEORGE C. WEST
Deputy Attorney General

May 9, 1968
Economic Development

James K. Keefe, Commissioner

Scope of the Maine Industrial Building Authority Act

SYLLABUS:

Under the State Constitution, Art. IX, § 14-A and 10 M.R.S.A. § 701-852 the Maine Industrial Building Authority may issue mortgage insurance on existing buildings and machinery in the State.

FACTS:

The Department of Economic Development has requested an opinion as to whether or not the Maine Industrial Building Authority may issue mortgage insurance on existing buildings and machinery in the State.

QUESTION:

Whether or not the Maine Industrial Building Authority may issue mortgage insurance on existing buildings and machinery in the State?

ANSWER:

Yes.

REASONS:

The basic authorization for the Maine Industrial Building Authority comes from the State Constitution, Art. IX, Sec. 14-A:

> "For the purposes of fostering, encouraging and assisting the physical location, settlement and resettlement of industrial and manufacturing enterprises within the State, the Legislature by proper enactment may insure the payment of mortgage loans on the real estate and personal property within the State of such industrial and manufacturing enterprises not exceeding in the aggregate $40,000,000 in amount at any one time and may also appropriate moneys and authorize the issuance of bonds on behalf of the State at such times and in such amounts as it may determine to make payments insured as aforesaid."

The enabling legislation is 10 M.R.S.A.§701-852. Before 1965 10 M.R.S.A §702 read as follows:

> "It is declared that there is a state-wide need *for new industrial buildings* to provide enlarged opportunities for gainful employment by the people of Maine and to thus insure the preservation and betterment of the economy of the State and its inhabitants. It is further declared that there is a need to stimulate a larger flow of private investment funds from banks, investment houses, insurance companies and other financial institutions including pension and retirement funds, to help satisfy the need for housing industrial expansion. The Maine Industrial Building Authority is created to encourage the making of mortgage loans for the purpose of furthering industrial expansion in the State." (Emphasis supplied)

The legislature in 1965 amended §702 to read as follows:

> "It is declared that there is a state-wide need to provide enlarged opportunities for gainful employment by the people of Maine and to thus insure the preservation and betterment of the economy of the State and its inhabitants. It is further declared that there is a need to stimulate a larger flow of private investment funds from banks, investment houses, insurance companies and other financial institutions including pension and retirement funds, to help finance industrial expansion. The Maine Industrial Building Authority is created to encourage the making of mortgage loans for the purpose of furthering industrial expansion in the State."

The deletion of the words "for new industrial buildings" shows that the intent was to include existing industry in the overall scope of the Act.

That we are able to go beyond the Constitutional provisions to the enabling legislation in order to better define the purposes is clear from *Martin v. Maine Savings Bank,* 154 Me. 259, 147 A. 2d 131 (1958):

> "The basic objective of §14-A and the Enabling Act is to foster, encourage, and assist the industrial expansion of the state through the use of the state's credit to a limited extent in financing the cost of needed new industrial buildings for the use of the industrial and manufacturing enterprises (which we may for convenience call "industries") mentioned in the Constitution. Only a bare outline of the purposes is found in §14-A. They are set forth in more detail in the Enabling Act."

Turning to § 703 subsection 1, before 1965 it read as follows:

" "Cost of project" shall mean the cost or fair market value of *construction,* lands, property rights, easement, franchises, financing charges, interest, engineering and legal services, plans, specifications, surveys, cost estimates, studies and other expenses as may be necessary or incident to the development, construction, financing and placing in operation of an industrial project." (Emphasis supplied)

In 1965 it was amended as follows:

" 'Cost of project' shall mean the cost or fair market value of *real estate improvements,* lands, new machinery and equipment including installation thereof, used machinery and equipment, property rights, easement, franchises, financing charges, interest, engineering and legal services, plans, specifications, surveys, cost estimates, studies and other expenses as may be necessary or incident to the development, construction, financing and placing in operation of an industrial project." (Emphasis supplied)

The words "real estate improvements" were substituted for "Construction" making § 703 consistent with § 702 by implying that new industry or new buildings are not requirements under the Act.

It is clear from a reading of these sections, and the 1965 amendments thereto, that the legislature envisioned refinancing of existing industry in the State as part of the overall scope of the Act.

Extensive changes in the Act were made by P. L. 1967 c. 525, none of which affect the reasoning or results in the preceding paragraphs.

WARREN E. WINSLOW, JR.
Assistant Attorney General

May 15, 1968
Education

Asa A. Gordon, Director, School Admin. Services

Compatibility of School Director's Office and Selectman's Office.

SYLLABUS:

Incompatibility of offices results when school administrative district director also holds office of selectman of member town.

FACTS:

Past opinions of the Office of the Attorney General have issued with conclusions that the Office of Selectman and the Office of School Committee member are incompatible. See opinions dated May 1, 15, 1936; April 18, 1942; and March 24, 1955.

A school administrative district director has inquired of the Department of Education whether he may hold the director's position together with the position of selectman of one of the towns which is a member of the school administrative district.

QUESTION:

May a person who holds the position of school administrative district director also

serve as a selectman in a member town of the district sans incompatibility resulting?

ANSWER:

No.

REASON:

The Maine Statutes contain provisions evidencing a legislative intention that school administrative district directors not be, simultaneously, selectmen of a member town of the district. For example, 20 M.R.S.A. §222 recites provisions for the dissolution of a school administrative district. Note that the district directors and the selectmen meet for the purpose of the preparation of a dissolution agreement. It seems inequitable that a director be required to represent both the district and his town relative to any such dissolution agreement. Too, the same section also contains language establishing procedures for the recounting of ballots cast in a district dissolution vote. The law authorizes the municipal officers of any participating municipality to request a recount of district votes; and the board of directors is charged with the authority to resolve any question regarding disputed ballots. If a district director holds the office of selectman of a member town, he may, on the one hand, be a member of the town council advancing a dispute as to ballots; and, on the other hand, he may be a member of the very board charged with the decision of disposing of such disputed ballots. Continuing, it is noted that 20 M.R.S.A. §302 vests the selectmen or municipal officers of a member municipality with the obligation of filling certain vacancies created on the board of directors. Surely, incompatibility would result in the event that a board of selectmen were to appoint one of their own members to the district's board. The statute, on this point, requires that the selectmen elect "a director from the municipality". There is no authority for the selectmen to elect one of their members to the board. Of course, this hypothetical situation is not dispositive of the question; but the tenor of the law is expressed.

Our position (that a selectman may not at the same time be a school administrative district director) concurs with the earlier expressions of this office issued on similar facts, i.e., that a selectman may not simultaneously hold the office of school committee member. The tenor of the several sections of the statutes relating to public education is that incompatibility results from a merger of the offices of selectman and school administrative district director in one person.

JOHN W. BENOIT
Assistant Attorney General

May 22, 1968
Attorney General

James S. Erwin, Attorney General

Power of Executive Councillor to Contract with State College.

SYLLABUS:

Since by statute the state colleges are now part of the University of Maine, which is not a State-owned or operated institution, contracts between such colleges and state

officials are no longer void by virtue of 17 M.R.S.A. § 3104 (1964). However, since the Executive Council exercises a degree of supervision and control over the University, a Councillor acts in manner incompatible with his office if he elects to so contract.

FACTS:

A member of the Executive Council is the president and majority stockholder in a corporation holding an automobile sales franchise. The corporation has been requested, as have other auto dealers, to submit a price quotation for a vehicle to be used by Farmington State College of the University of Maine.

QUESTION:

May a corporation in which a member of the Executive Council holds an interest validly contract with the University of Maine or a branch thereof?

ANSWER:

No. The making of such a contract is incompatible with the office of Executive Councillor.

OPINION:

Such a contract would not be void under 17 M.R.S.A. § 3104 (1964) which in pertinent part provides:

> "No . . . person holding a place of trust in any state office . . . shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State . . ., and any contract made in violation hereof is void."

It does not need to be asserted that a member of the Executive Council is, necessarily, "a person holding a place of trust in (a) state office." Cf. *Opinion of the Justices,* 108 Me. 545, 549, 82 Atl. 90, 91 (1911). It is equally apparent that the honorable Councillor would be indirectly pecuniarily interested in the contract for the vehicle, if such contract were awarded to the corporation in which he holds shares.

However, Farmington State College, though formerly operated wholly by the State [for the legislative history surrounding the establishment and operation of the state colleges, see *Inhabitants of Orono v. Sigma Alpha Epsilon Society,* 105 Me. 214, 219, 74 Atl. 19, 20 (1909)], became by statute part of the University of Maine on April 26, 1968. *See* Me. Priv. & Spec. Laws 1968, ch. 229. The University of Maine has been declared by the legislature to be an "agency of the State", 20 M.R.S.A. § 2251 (1964); but such agency extends, apparently, only to assumption of the burden placed on the legislature by Me. Const., Art. VIII to encourage and provide for education. *Cf.* 1963-64 Att'y Gen'l Rep. 193. The unique status of the University of Maine in this regard was recognized in *Inhabitants of Orono v. Sigma Alpha Epsilon Society, supra,* where it was said:

> "The University of Maine, while chartered by the State and fostered by it, especially in recent years, is not a branch of the State's educational system nor an agency nor an instrumentality of the State, but a corporation, a legal entity wholly separate and apart from the State." 105 Me. 214, 219, 74 Atl. 19, 21.

We conclude that any contract made by Farmington State College of the University of Maine after the effective date of Me. Priv. & Spec. Laws 1968, ch. 229, is not a "contract made in behalf of the State" within the meaning of 17 M.R.S.A. § 3104

(1964). Therefore, a state official may be a party to the contract without incurring the penalties of the statute.

However, the Executive Council may be called upon to approve an emergency appropriation for the University, to confirm its trustees, or to take some other action affecting the rights and interests of that institution. It would appear, then, on common-law principles, that for a Councillor to contract with the University, even on a bid basis as here, would to some extent jeopardize the arm's-length disinterested relationship called for when making a decision in his capacity as Councillor regarding the University. The role of contractor with the University would, therefore, conflict with the duties of an Executive Councillor. *Cf. Howard v. Harrington,* 114 Me. 443 (1916).

ROBERT G. FULLER, JR.
Assistant Attorney General

May 23, 1968
Water and Air Environmental
Improvement Commission

Robert H. Smith, Sanitary Engineer

Transferability of Waste Discharge Licenses.

SYLLABUS:

The privileges of a waste discharge license issued to a corporation under 38 M.R.S.A. § 414 (1964) accrue only to that corporation, and upon acquisition of the licensee corporation by another corporation, or upon sale to another corporation of the facility which is the source of the licensed effluent, the license is extinguished and does not pass to the successor corporation either by operation of law or by a purported assignment.

FACTS:

In 1960 corporation X applied for and was granted a license by the Water and Air Environmental Improvement Commission to discharge wastes. In 1964, corporation X was acquired by corporation Y. In 1967, corporation Y sold to corporation Z the plant from whence came the discharge. No application for discharge license has ever been made to the Commission by corporations Y or Z.

QUESTIONS:

1. Where a corporation previously granted a waste discharge license is acquired by another corporation, does the acquiring corporation succeed by operation of law, or may it succeed by assignment, to the privileges conferred by the license?
2. Where a corporation previously granted a waste discharge license sells to another corporation the facility from which the licensed discharge emanates, do the privileges conferred by the license pass to the buyer corporation either by operation of law or by a provision in the terms of the sale that such privileges shall pass?

ANSWERS:

No, to both questions.

REASON:

A license to discharge waste is granted only after a public hearing and a determination by the Commission that, on the evidence presented, the proposed discharge, either of itself or in combination with existing discharges, will not lower the classification of any body of water. 38 M.R.S.A. § 414 (1964). The evidence put in by the applicant concerning the composition of the proposed discharge is one of the major factors considered by the Commission in determining whether to grant a discharge license. Accordingly, the issuance of such a license pre-supposes that the Commission believed such evidence. A relation of trust or confidence has been created between the licensee and the Commission. The license, issued under such circumstances is patently intended as a personal privilege accruing only to the licensee.

The privilege conferred by a discharge license is that of using the public waters of the State for the discharge of wastes – a privilege which, by statute, a person does not possess without such a license. 38 M.R.S.A. § 413 (1964). This privilege was not created for the purpose of benefiting the licensee's land, but to protect the public waters. Neither is the benefit of the license intended to be incident to the possession of land. The Commission does not (nor should it) require, as a condition precedent to issuance of a discharge license, that the applicant possess an estate in the land from whence he proposes to discharge. *Stanton v. St. Joseph's College,* 233 A. 2d 718, (Me. 1967).

Therefore, when a licensee corporation relinquishes control of its discharge, either by virtue of being acquired by another corporation, or by selling the plant from which the discharge emanates, the license is extinguished. It cannot pass from the licensee corporation to the successor corporation by operation of law, because the grant of the license was intended only as a personal grant of privilege to the original licensee, and not as an equitable servitude appurtenant to the land. For the same reasons, any attempted assignment of the privilege conferred by the license is void. Restatement, *Property,* § 517 (1944); American Law of Property § 8.122 (1952).

CROSS REFERENCE

The Water and Air Environmental Improvement Commission has no power to transfer a discharge license from the initial licensee to a subsequent party. See 1959-60 Att'y Gen. Rep. 170.

ROBERT G. FULLER, JR.
Assistant Attorney General

May 28, 1968
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

SUBJECT: Insurance Premium Tax

SYLLABUS:

THE INSURANCE PREMIUM TAX IS BASED UPON PREMIUMS RECEIVED FROM POLICYHOLDERS AND DOES NOT INCLUDE REINSURANCE PREMIUMS.

FACTS:

Your memorandum dated March 28, 1968, sets forth the following problem:

"A question has arisen as to the proper method of determining the insurance premium tax in cases where an insurance company reinsures in another company. We understand this represents the situation where Company A collects the premium from the policyholder, and in turn pays a portion of the premium to Company B on account of the portion of the risk assumed by Company B.

The insurance premium tax is assessed with respect to 'all gross direct premiums' written on risks located or resident in this State. (See sections 2511 and 2513 of Title 36)."

QUESTION:

In the case of reinsurance, should the premium tax be based upon the total premium collected by Company A from the policyholder, or upon the net premium, after deducting the amount paid by Company A to Company B?

ANSWER:

The premium tax in the case of reinsurance should be based upon the total premium collected by Company A from the policyholder.

OPINION:

Insurance companies taxed pursuant to 36 M.R.S.A. §§ 2511-2522 upon "all gross direct premiums" written on risks located or resident in a state for insurance of life, annuity, fire, casualty and other risks.

There is no statutory definition of "gross direct premiums". That term is defined in *Best's Insurance Reports,* fire and casualty, 1966 as representing the aggregate amount of recorded originated premiums, other than reinsurance, issued.

Prior to 1939 the premium tax was determined according to the following statutory formula:

In determining the amount of tax due. . . there shall be deducted by each company from the full amount of premiums received, the amount of all return premiums on policies cancelled, the amount of all premiums paid to companies authorized to transact business in the State for reinsurances of risks in the State, and the tax shall be computed on the amount thus actually received by said companies or their agents as aforesaid." (R.S. 1930, c. 12, § 53).

In 1939 the foregoing section was amended:

In determining the amount of tax due . . . there shall be deducted by each company from the full amount of gross direct return premiums, the amount of all direct return premiums thereon, and all dividends paid to policy-holders on direct premiums, and the tax shall be computed by said companies or their agents as aforesaid. (P.L. 1939, c. 1 § 84).

The amendment added "gross direct" as modifiers of the term "premiums". Throughout the statute the reference to premium was changed to "direct" premium. Omitted as a deduction from the tax base were reinsurance premiums paid on risks in Maine.

One of the reasons for the 1939 amendment was a Supreme Court decision handed down the year before. *Connecticut General Co. v. Johnson,* 303 U.S. 77 (1938). In that case the court struck down a California tax on reinsurance contracts written in Connecticut with premiums paid there, even though upon risks originally insured in

California. California's tax was " 'upon the amount of the gross premiums received upon it's business done in this State, less return premiums and reinsurance in companies or associations authorized to do business in this State . . . ' " Ibid at 78. A deduction was allowed for reinsurance. The attempt was to apportion the tax between the companies accepting the risks. The Connecticut company involved was authorized to, and did, do business in California.

The court pointed out that the State did not have to redistribute the tax, but could have exacted the tax from the original insurers.

Although the Maine Legislature may have been attempting to include reinsurance premiums in the tax base by omitting the reinsurance deduction, at the same time it made the tax applicable to "direct" premiums. It appears to have been the intent of the Legislature to tax all premiums received from policyholders and to eliminate possible redistribution of the tax to reinsuring companies. In other words, a "direct" premium would be received from the policyholder, which would make unnecessary the provision for deduction of reinsurance. This result apparently is what the court in Johnson, supra, was suggesting to California.

A 1956 opinion of the Attorney General dealing with the insurance premium tax as it applies to annuities had occasion to discuss the legislative amendment of 1939 and suggested that "direct" refers to "insurance" and does not Include "reinsurance". Opinion of the Attorney General, August 1, 1956. See also Opinion of the Attorney General, January 6, 1966.

Therefore, premiums paid by one insurance company to another for reinsurance are not taxable under 36 M.R.S.A. §§ 2511-2522.

JAMES M. COHEN
Assistant Attorney General

May 29, 1968
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

SUBJECT: University of Maine – Application of Property Tax

SYLLABUS:

THE PROPERTY OF THE UNIVERSITY OF MAINE IS NOT EXEMPT FROM TAXATION AS PROPERTY OF THE STATE OF MAINE, BUT IS EXEMPT PURSUANT TO AND TO EXTENT OF EXEMPTION FOR LITERARY AND SCIENTIFIC INSTITUTIONS.

FACTS:

The planned construction of the University of Maine Book Store has raised a question as to the extent of property taxation exemption for the University.

QUESTIONS:

1. Whether property of the University of Maine is to be entitled to the same property tax exemption as "the property of the State of Maine" under 36 M.R.S.A. § 651 (B)?

2. If not, whether exemption must be found under 36 M.R.S.A. § 652 (B), applying to literary and scientific institutions.

ANSWERS:

1. No.
2. Yes.

REASONS:

Question 1.

"The property of the State of Maine is exempt from taxation" 36 M.R.S.A. § 651 (B).

"The University of Maine is declared to be an instrumentality and agency of the State for the purpose for which it was established and for which it has been managed and maintained . . . . " 20 M.R.S.A. § 2252.

Although the University is an instrumentality and agency of the State, the basic question to be answered for tax purposes is whether the property of the University is the property of the State of Maine.

One approach in attacking this question is to compare the University with the former State colleges. The University on the one hand was chartered by the Legislature as a corporation. The State colleges were set up directly by the State, title to the property being in the name of the State. No corporation or separate entity was created.

The distinction between the University and the State Colleges was discussed by the court in Orono v. Sigma Alpha Epsilon Society, 105 Me 214 (1909).

> . . . the defendant . . . claims . . . an immunity from taxation on the ground that the University of Maine is a branch of the State government an instrumentality of the State itself and therefore its property is public property, no more subject to taxation by the Town of Orono than a jail, a court house or an insane hospital, and still further that the relation between the University and the Defendant are such that the University reaches to it. The doctrine of such immunity is everywhere acknowledged when the facts present an opposite case . . . .
>
> The necessary facts, however, are lacking here. *The University of Maine,* while chartered by the State and fostered by it especially in recent years, *is not a branch of the State's educational system nor an agency nor an instrumentality of the State, but a corporation, a legal entity wholly separate and apart from the State.* The defendant seeks to class it as a State institution in the same sense as are the public schools or the normal schools, but such is not its legal status.
>
> A comparison with the normal schools of the State is a fair one to illustrate the difference. The State maintains at the present time four normal schools . . . . the State itself took on a new form of public service and the educational system thus adopted became in fact an instrumentality of the State. No corporation was created, no separate entity was brought into existence, but the State simply put its own beneficent hand in a new direction, and the title to the property was taken in the name of the State.
>
> . . . .
>
> The difference between the relation of normal school and of the University of Maine to the State is paralled (sic) in the difference between the various so called public or general hospitals of the State, and the two hospitals for the insane. The

former are doing a necessary and charitable work and are recipients of the bounty of the State, but the latter alone represent the State itself in its sovereign capacity along charitable lines. The former are apart from the State, the latter a part of the State. Actions at law would be against the former as against any corporation, but not against the latter as no suit lies against the sovereign power. Supra, at 219, 222. (Emphasis supplied).

Considering together the Orono case and 20 M.R.S.A. §2252, which statute does not reverse the court's decision, the conclusion reached is that the University has been declared to be an agency of the State for educational purposes, but it is a legal entity wholly separate and apart from the State.

The University is not the State of Maine. Although it is a statutory agency for educational purposes, it does not possess the general attributes of a governmental agency of the State. Control of the University is in a corporate Board of Trustees, not State officials. It is not a department of State government for purposes of the State Retirement System. Opinion of the Attorney General, April 30, 1945.

Even as an agency for the purpose for which it was established, the University is not exempt under the provision of 36 M.R.S.A. § 651, (B), because its property is not the property of the State of Maine. Exemptions must be construed strictly. The University fails to fall within this exemption.

Question 2.

In order for the University to remain free from taxation, its property must be "owned and occupied or used solely for their own purposes . . . " as a literary and scientific institution. 36 M.R.S.A. § 652 (B). The University of Maine is a literary and scientific institution. *Orono v. Sigma Alpha Epsilon Society.* Op. Cit. at 217.

Therefore, like any other college or university in the State of Maine, exemption of property from taxation is dependent upon ownership and occupation or use solely for its own purposes, i.e. education. Whether property of a literary and scientific institution is exempt is dependent upon the facts presented to the taxing authority. In this case, it would be the determination of the assessors of the Town of Orono, subject, naturally, to review by the courts.

JAMES M. COHEN
Assistant Attorney General

June 5, 1968

Maynard Dolloff
Commissioner of Agriculture
State Office Building
Augusta, Maine

Dear Maynard:

You have asked for a statement of your authority relative to inspecting potatoes in freight cars at Northern Maine Junction. It is my understanding that there are presently a large number of such cars of potatoes which have been sitting at this location for several days and may perhaps continue there for an undetermined time. You, as Commissioner of Agriculture, believe that it is necessary to inspect these potatoes to determine if they are now within the grade indicated on the containers in which they rest.

7 M.R.S.A. § 956 provides in part as follows:

"The commissioner shall diligently enforce all of the provisions of sections 951 to 957. He, either in person or by a duly authorized representative, shall have free access, ingress and egress to any place or any building, boat, truck, trailer, or *railroad car,* warehouse, *depot, station,* packing house, boat dock, or any building wherein potatoes are packed, stored, transported, sold, offered or exposed for sale or for transportation. He may also, in person, or by duly authorized representative, open any container and may, upon tendering market price, take samples therefrom. * * * ." (Emphasis supplied.)

You will note that this authorizes you or your duly authorized representative to have free access to the above places wherein potatoes are packed, stored, transported, sold, offered or exposed for sale or for transportation.

A reference to 7 M.R.S.A. § 950 indicates that potatoes packed in any type or kind of container and found in a depot, station, railroad car, and other locations are deemed to be exposed for sale. The first paragraph of this section reads as follows:

"1. Expose for sale. Potatoes packed in any type or kind of container, and found in any place in the State of Maine, whether that place shall be a depot, station, warehouse, packing house, boat dock or any place where potatoes are held in storage, or loaded on a boat, truck, trailer, or railroad car or motor vehicle, shall be deemed to be exposed for sale under this subchapter."

It is the opinion of this office that section 956 gives you, or your duly authorized representatives, full authority to inspect potatoes in the railroad cars at Northern Maine Junction. Section 954-A authorizes you to seize any potatoes if the containers bear any statements, design or device which shall be false or misleading or if the potatoes are packed in such manner that the face or shown surface is not an average of the contents of the package or if such potatoes fail to meet the minimum grade requirements established as a state grade by you or if the potatoes are not accompanied by a proper bill of lading or invoice. You may hold the potatoes in accordance with this section until they have been regraded or relabeled and accompanied by a Federal-State inspection certificate showing that the potatoes in such containers conform in every particular to the markings on such containers or until a proper bill of lading or invoice is produced.

It is the opinion of this office that you have adequate authority to inspect these potatoes.

Very truly yours,

GEORGE C. WEST
Deputy Attorney General

June 6, 1968

Honorable Raymond M. Rideout, Jr.
Manchester
Maine

Dear Mr. Rideout:

SYLLABUS:

An allotment covers anticipated expenditures of funds made available to a department or agency during one fiscal year. An allotment may be encumbered even though the contract is for an amount greater than the allotment. It is not necessary to

have funds available for the full amount of the contract when the allotment is encumbered.

FACTS:

The 102nd Legislature approved a bond issue and the people ratified the same for the purpose of constructing a cultural building. A small amount of the bonds have been issued to finance preliminary work. It is expected that a contract will be signed in the early fall for an amount in the vicinity of $4,000,000. The building will not be completed until 1970. Payments on the contract will be made monthly as the building progresses. Final payment will be made after completion of the building.

Controversy has arisen concerning the issuing of bonds. The State Treasurer does not want to issue the whole amount of the authorized bonds at this time. The Commissioner of Finance and Administration believes that in order to have the Governor and Council allot the bond issue and the Controller encumber the funds, that the actual money must be in the State's hands.

QUESTION:

Does the law condition the right of a State department or agency to contract (with proper approval) upon there being at the time of execution, money in amount sufficient to fund the entire obligation that may accrue under the contract?

ANSWER:

No.

REASONS:

The first step in the procedure which we are called upon to study is the "allotment". (It is not necessary to trace the steps by which a bond issue becomes a law. We can say that P. & S. L. 1965, c. 259, has been ratified by the people.)

5 M.R.S.A. §1667 provides in part:

> "Not later than June 1st of each year, the Governor shall require the head of each department and agency of the State Government to submit to the Bureau of the Budget a work program for the ensuing fiscal year. Such work program shall include all appropriations, revenues, transfers and *other funds,* made available to said department or agency for its operation and maintenance and for the acquisition of property, and it shall show the requested *allotments* of said sums by quarters *for the entire fiscal year,* classified to show allotments requested for specific amounts for personal services, capital expenditures and amounts for all other departmental expenses. The Governor and Council . . . shall review the requested allotment with respect to the work program . . . before approving the same. The aggregate of such allotments shall not exceed the total sums made available to said department or agency for *the fiscal year* in question." (Emphasis supplied)

Thus we see that a department having funds available to it must have such funds allotted to it by the Governor and Council before the department may spend the funds. However, we also note that the Governor and Council may make allotments for "the entire fiscal year." Also, the total allotment shall not exceed "the total sums made

available to said department or agency for the fiscal year in question." The statute thus restricts the Governor and Council to making allotments to not more than one full fiscal year. Does this mean that when a bond issue has been authorized, the Governor and Council may not allot beyond "the entire fiscal year"? We must answer in the affirmative. The Governor and Council may only allot so much of a bond issue as is estimated will be used in one fiscal year.

We should here indicate that the words "appropriations, revenues, transfers and other funds" are not synonymous with "cash" or "money". The words actually mean "credits" given to the various departments or agencies by enactment of laws in the manner prescribed by the Constitution.

We next need to look at the word "encumbrance" and its effect. We refer you to an opinion of this office dated July 10, 1953, addressed to Raymond C. Mudge, Commissioner of Finance and Administration. (Copy attached.) In this opinion are the following statements:

> "An encumbrance exists when there is such a charge or liability, arising from negotiations, that there results, on the part of the State or one of its departments or agencies, an obligation to pay a sum of money for a particular purpose.
>
> "The term 'encumbrance' has a particular meaning when used in governmental accounting. See 'A Dictionary for Accountants', Kohler, where encumbrance is defined as:
>
> " 'A proposed expenditure, evidenced by a contract or purchase order, or determined by administrative action.' "

Although the statutes do not specifically so state in so many words, it is the Controller's duty to encumber funds. This is impliedly stated in 5 M.R.S.A. §1541, sub. 2.

So we now know that when "funds (are) made available" to departments or agencies they must first be allotted. Once allotted, they may be encumbered by the Controller. An encumbrance depends upon an allotment. Therefore, where an allotment may not extend beyond an "entire fiscal year" the Controller may not encumber beyond the allotment.

Under the given facts, the Governor and Council may only allot funds from the authorized bond issue for the fiscal year ending June 30, 1969. When a contract properly executed and approved is presented to the Controller, he can only encumber such funds as are allotted.

Hence, it follows that it is not necessary to the execution and approval of a contract that there be money in amount sufficient to fund the entire obligation.

In addition, it might be well to mention another opinion of this office dated December 4, 1951, addressed to the Commissioner of Finance and Treasurer of State. That opinion noted the *Opinion of the Justices,* 139 Maine 416, at 419, and concluded that "the issuance of bonds an unreasonable length of time before the maturity of indebtedness for the avowed reason . . . to establish an investment fund for gain and profit, will create a new debt or liability" in violation of Section 14, Article IX of the Constitution.

GEORGE C. WEST
Deputy Attorney General

June 6, 1968
Education

Kermit S. Nickerson, Deputy Commissioner

Authority of Organized Plantations to Accept Gifts

SYLLABUS:

Since the Legislature has not given organized plantations the power to receive gifts of property, such a gift may not be accepted by such a plantation.

FACTS:

The Federal Surplus Property Office has posed for answer through your office the following question:

QUESTION:

May an organized plantation accept a gift of real property from the Federal Government?

ANSWER:

No. However, if the property is to be used for legal plantation purposes, the cost of acquiring same may be a "legal plantation expense" for which money may be raised by taxation and expended.

OPINION:

The organized plantation is a political entity, formed under enabling legislation, 30 M.R.S.A. §§ 5602-5605 (1964), existing only to serve the needs of government and, like other municipal corporations, possessing no powers not conferred upon it by statute. Compare *Camden v. Camden Village Corp.,* 77 Me. 530, 1 Atl. 689 (1885) (village corporation); *Hooper v. Emery,* 14 Me. 375 (1837) (town); *Farris ex rel. Anderson v. Colley,* 145 Me. 95, 73 A. 2d 37 (1950) (city).

There is no statute which permits organized plantations to accept gifts of real property. Such legislative permission is a condition precedent to acceptance of a gift by an organized plantation. The concern of the Legislature that such gifts be properly received and administered by political subdivisions of the State is manifest in 30 M.R.S.A. § 1903 (1964), by which municipalities are empowered to accept gifts of property, provided that the property is received in trust and for certain specified purposes.

30 M.R.S.A. § 5614 (1964) in part provides: "All plantations may raise and expend money . . . for sums necessary for *legal plantation expenses.*" (Emphasis supplied.) It would follow, therefore, that if the property in question was to be used for a legal plantation purpose, the cost of purchasing same would be a "legal plantation expense" within the meaning of the statute. Otherwise, the plantation must seek legislative authority to acquire the property.

ROBERT G. FULLER, JR.
Assistant Attorney General

June 7, 1968
Education

Kermit S. Nickerson, Deputy Commissioner

School Residence of State Wards.

SYLLABUS:

The placement of state wards in a private academy by the Department of Health and Welfare does not thereby constitute the wards as residents of the school administrative district in which the private academy is located; and under such placement, the district is not liable for tuition.

FACTS:

The Department of Health and Welfare, Division of Child Welfare, due to the lack of foster homes, has placed a few wards at two of the private academies in this State. These wards live in dormitories and are subject to school regulations in the same manner as all other enrolees at the academies. The academy officers are not designated as foster parents although the wards are in their care and custody while school is in session. The local unit has no jurisdiction over the admittance of such students to the school.

QUESTIONS:

1. Given the above factual situation, does the presence at the academy of state wards during school sessions constitute school residence in the administrative unit wherein the academy is located, thus making the private school in effect a foster home?
2. Is the (school) unit legally responsible for the payment of tuition of these wards?

ANSWERS:

1. No.
2. No.

REASON:

The answers to the above-designated questions are largely derivative of the language of 20 M.R.S.A. §1293 which reads as follows:

> "Tuition for state wards
>
> "Administrative units which do not maintain or support a secondary school shall be reimbursed by the Department of Health and Welfare for the amounts expended by them for secondary tuition of state wards residing in such administrative units." (Emphasis supplied)

One must ask the simple question, what expenditure has been incurred by a local school unit by the direct placement of state wards in a private academy, for which reimbursement should be made? When it is impossible to place wards in foster homes and the Department of Health and Welfare directly places said wards in a private school, tuition payments should be made directly to the school by the Department. It makes little sense to conclude that by the placement of a ward in a private school by the State, residency within the school district in which the private institution is located is

established by the student ward for which the district may pay tuition in the first instance, and then seek reimbursement from the State. Furthermore, mere attendance at any school, whether public or private, does not per se establish residence within the geographic area in which said school is located.

PHILLIP M. KILMISTER
Assistant Attorney General

June 7, 1968
Treasury

Michael A. Napolitano, State Treasurer

Allotments, availability of Funds

SYLLABUS:

Actual funds need not be available for expenditure prior to the approval of departmental allotments.

FACTS:

In your memorandum of April 24, 1968 submitted to this office you state the following factual resume:

> "For budgeting, allotting and accounting purposes the state fiscal year is divided into four quarters. A department is required to submit to the State Budget Officer a work program projecting its needs on a quarterly basis. After review by the State Budget Officer and upon approval by the Governor and Council, the department is notified of the amounts of money allotted to its work program by quarters for the ensuing year."

QUESTION:

Do the various Appropriation Acts or Revised Statutes of Maine require that actual funds must be available before allotments can be approved?

ANSWER:

No.

OPINION:

The entire state budget system is based upon estimated receipts and expenditures and the balancing of one against the other for definite periods of time. State income derivative from taxation and other major income sources can be estimated with a certain degree of accuracy, however the exact time when revenue due the state will be received is not predictable.

The approval of state departmental allotments is based upon estimated income accruable to the state and not the amount of funds in the state treasury actually available for expenditure at any one time. To base approval of anticipated state departmental expenses upon the amount of funds actually held in the state treasury on a

given date would lead to an archaic and unworkable method of state financing.

An expenditure and an appropriation are not synonymous.

> "An 'expenditure' is the expending, a laying out of money, disbursement, and is not the same as an 'appropriation', the setting apart or assignment of funds to a particular person or usage." *Grant v. Gates,* 97 Vt. 434, 124 A. 76; *Suppiger v. Eniking,* 60 Idaho 292, 91 P. 2d 362.

In most appropriation acts including P & S 1967, c. 154, the following language occurs:

> "Whenever it appears to the Commissioner of Finance and Administration *that the anticipated income of the State will not be sufficient to meet the expenditures authorized by the Legislature,* he shall so report to the Governor and Council and they may temporarily curtail allotments equitably so that expenditures will not exceed the *anticipated income.*

The above-quoted language is clearly indicative of the fact that the approval of allotment, or expenditure requests, is based upon anticipated income and not actual income received. It is clearly permissible, and indeed an economic fact of life, that estimated expenditures of state government may be approved in any amount (subject only to the maximum limits set by the legislature), irrespective of the amount of actual funds in the state treasury at any given time.

PHILLIP M. KILMISTER
Assistant Attorney General

June 10, 1968
Maine State Retirement System

E. L. Walter, Executive Secretary

Prudent Man Investment Rule Required.

SYLLABUS:

The Board of Trustees of the Maine State Retirement System is without authority to waive the statutory provision which requires that all investments by its bank fiduciary be in accordance with the prudent man investment rule. Further, the Board is without authority to allow its bank fiduciary to commingle trust funds of the Maine State Retirement System with other trust funds in the fiduciary's possession.

FACTS:

The First National Bank of Boston, the bank fiduciary for the Maine State Retirement System, has advised the Retirement System that starting July 1, 1968, it is the Bank's intention to establish "Selected Pooled Funds". The reason is to take advantage of investments which are frequently of such a size and such a nature that it is difficult to acquire them in the normal type of retirement fund. The selected funds will be growth oriented and will place particular emphasis on investments which have a projected high rate of overall annual increment which would tend to make them more volatile than other less specialized situations.

It would consequently be necessary to allow the First National Bank of Boston to invest without being bound by any rule of investment law, including, without restriction, investments that would yield a high rate or income or no income at all if the Maine State

Retirement Fund is to participate. In addition, it would be necessary for the bank to have authority to commingle funds of the Maine State Retirement System with other funds.

Title 5 M.R.S.A. § 1061, subsection 1, provides in part as follows:

"1. Duties of board of trustees.

"The members of the board of trustees shall be the trustees of the several funds created by this chapter and shall be authorized to cause such funds to be invested and re-invested by the bank fiduciary *in accordance with the prudent man rule* subject to periodic approval of the bank's investment program by the trustees." (Emphasis supplied.)

QUESTION NO. 1:

Does the Maine State Retirement System, acting through the Board of Trustees, have the authority to allow the bank fiduciary to invest part or all of the funds of the Maine State Retirement System that are in the bank fiduciary's custody without being bound by any rule of investment law?

QUESTION NO. 2:

Would it be permissible for the bank fiduciary to commingle the funds of the Maine State Retirement System in its custody with other funds?

ANSWER:

1. No.
2. No.

REASON:

Reason as to Question No. 1.

Title 5 M.R.S.A. § 1061, subsec. 1 requires that all investments and reinvestments of the bank fiduciary be made in accordance with the prudent man rule. It is consequently the opinion of this office that the Board of Trustees of the Maine State Retirement System is without authority to allow the First National Bank of Boston to invest trust funds without being bound by any rule of investment law.

Reason as to Question No. 2.

The Supreme Judicial Court of Maine has indicated, in *Moore v. McKenzie,* 112 Me. 356, that there is no general authority of law for the mingling of trust funds. Although the legislature has authorized the commingling of trust funds in some specific instances, it must be observed that the statutory authority allowing the Board of Trustees to deposit funds in trust with a bank fiduciary does not authorize the commingling of such funds. It consequently is our opinion that the Board of Trustees is without authority to allow the commingling of Maine State Retirement trust funds with other trust funds.

HARRY N. STARBRANCH
Assistant Attorney General

June 12, 1968
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Subject: Adams Leasing Corporation

SYLLABUS:

A MAINE LESSOR LEASES TRUCKS AND TRAILERS TO A MAINE LESSEE. BY VIRTUE OF 36 M.R.S.A. § 1861 AND § 1752 (21) THE LESSOR IS NOT EXEMPT FROM THE MAINE USE TAX.

FACTS:

Adams Leasing Corporation is a Maine Corporation located in South Sanford. Its primary business is that of leasing trucks and trailers to Paul V. Adams, Inc., another Maine corporation which also is located in South Sanford. Adams Leasing, Inc., the lessor, and Paul V. Adams, Inc., the lessee, are both located at the same address.

The lessee has its principal terminal in South Sanford and it also has terminals in Bangor, Portland and in Boston. Garage or repair facilities are located at the South Sanford Terminal and major repair work is performed there. The South Sanford Terminal is owned by Adams Leasing and is leased to Paul V. Adams, Inc.

The trucks and trailers which are leased by lessor to lessee are purchased outside the State and are first brought into Maine under load by lessee. The Maine Use Tax is assessed upon the lessor. The lessor is not engaged in interstate commerce.

The lessee is responsible for maintaining and repairing the vehicles. Major repairs are done at the Sanford terminal. Maintenance can be performed on the vehicles by other parties only with the prior approval of the lessor.

The lessor pays for the registration of each vehicle. The vehicles are registered in Maine. The lessor pays for and maintains insurance policies on the vehicles. The lessor controls who shall and who shall not operate the vehicles. The lessor, with or without cause, can cause a driver to be replaced. The lessor can terminate this lease by giving 13 days notice, subject to the lessee's right to purchase.

QUESTION:

Is a use tax due from the lessor on the trucks and trailers owned by the lessor?

ANSWER:

Yes.

LAW:

> "A tax is imposed on the storage, use or other consumption in this State of tangible personal property, purchased at retail sale at the rate of 4½% of the sale price. Every person so storing, using or otherwise consuming is liable for the tax until he has paid the same or has taken a receipt from his seller, thereto duly authorized by the Tax Assessor, showing that the seller has collected the sales or use tax in which case the seller shall be liable for it . . . ." Title 36 M.R.S.A. §1861.

" 'Use' includes the exercise in this State of any right or power over tangible personal property incident to its ownership when purchased by the user at retail sale, *including the derivation of income, whether received in money or in the form of other benefits, by a lessor from the rental of tangible personal property located in this State.*" Title 36 M.R.S.A. § 1752 (21) (Emphasis supplied)

REASONS:

It is clear that the lessor derives income from the rental of tangible personal property. However, one must ask whether or not the trucks and trailers are "located in this State". On these facts, it seems clear that they are located in this State. The lessor, a Maine corporation, leases the trucks and trailers to another Maine corporation. Both corporations are located in South Sanford. The principal terminal is in South Sanford and two of the three sub-terminals are located in Maine. The trucks and trailers are overhauled and repaired in this State.

It must be admitted that these trucks and trailers are not permanently located in Maine, nevertheless, on these facts, it is difficult to conclude that they are located in another taxing jurisdiction.

'permanence . . . is not essential to the establishment of a taxable situs for tangible personal property. It means a more or less permanent location for the time being. The ownership and uses for which the property is designed, and the circumstances of its being in the State, are so various that the question is more often a question of fact than law." 51 Am Jur § 454.

Also Adams Leasing, the owner of these vehicles, is domiciled in Maine.

"The domicile of the owner is the taxable situs assigned to tangibles when an actual situs has not been acquired elsewhere. That state is the situs for purposes of taxation of tangible personal property temporarily in another state, but not permanently located there." 51 Am Jur § 457.

The United States Supreme Court in *Northwest Airlines, Inc. v. Minnesota,* 322 U. S. 292, had to deal with a similar problem, which involved the location of airplanes which were continually engaged in interstate commerce. It should be noted that the decision concerned a personal property tax. The Court stated at page 299:

"But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back. Using the language of domicile . . . the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts.

***

But not to subject property that has no locality other than the state of its owner's domicile to taxation there would free such floating property from taxation everywhere."

An alternative argument which also compels the imposition of the Use Tax is that there has been an exercise in this State of a right or power over tangible personal property purchased by the user at retail sale, incident to its ownership. *Commercial Leasing, Inc. vs Johnson,* 160 Me. 32 is controlling. One should recall that the lessor, Adams Leasing Corporation, approves all major repairs which are performed on the vehicles. Major repairs are done at the Sanford terminal. The lessor pays for and registers each vehicle. The lessor pays for and maintains the insurance policies on the vehicles. The lessor controls who shall and who shall not operate the vehicles. The lessor, with or

without cause, can cause a driver to be replaced. It seems apparent that on these facts, the lessor has exercised within the territorial limits of this State a right or power incident to the ownership of property.

It should be pointed out that the Maine Court in *Commercial Leasing* hinged its decision on the fact that the lessor, who was responsible for maintaining the vehicles, chose to have them repaired in this jurisdiction. On the facts stated above, the lessee, not the lessor is responsible for and actually performs all major repairs on the vehicles. This writer does not believe that this fact weakens the Court's rationale in Commercial Leasing. The substance of the Adams lease should be controlling and not its form. In *Charles E. Austin, Inc. v. Kelly Secretary of State,* 32 N.W. 2d 694, the Michigan Court stated at page 697:

> "Under the involved circumstances here shown, where there are two corporations in both of which the wife of Charles E. Austin is the owner of the corporate shares as well as the president and secretary of both corporations, and who also individually owns all of the storage facilities and leases the same to said corporations, equity will look through and behind the corporate entitles to ascertain the true situation.
>
> ***
>
> We have frequently said that equity looks to the substance rather than to the form."

The courts have held in numerous cases that the taxing authorities are not always required to respect the separate entity of a corporation if a distortion in tax liability results. See *Higgins v. Smith,* 30 U. S. 473, *Griffith v. Commissioner,* 308 U.S. 355, *National Investors Corporation v. Hoey,* 144 F. 2d 466. On these facts, whether the lessor or the lessee is responsible for maintaining the vehicles seems to substantively make no difference whatsoever.

The trucks and trailers which are the subject of the assessment are not exempt from non-discriminatory state taxation because of their use by the lessee in interstate commerce. The Use Tax is upon the lessor. The lessor is not engaged in interstate commerce. The Tennessee Supreme Court in *Central Transportation Company v. Atkins,* 305 S. W. 2d 940, said at page 942:

> "Of course the State is powerless to levy a tax upon interstate commerce and so far as this tax act is concerned in this particular instance we can find no effort of the State to be unfair in levying a tax which is a burden on interstate commerce. Just because the lessee under this lease might want to use the leased goods in interstate commerce is a matter entirely up to the lessee's choice and control. It must be remembered that this lease was executed in Tennessee between two Tennessee corporations. The tax is on the lessor and on the making of the lease and nothing is contemplated by the terms of this lease that the tax would be a burden on commerce between the States. The lessor, under the terms of this lease, reserved no power to determine when and where and how the lessee used these trucks and did business. All the appellant did was to furnish it the trucks to do business with."

The taxation of tangible personal property which is employed in interstate commerce is discussed in *Eastern Air Transport v. Tax Commissioner,* 285 U.S. 147; *Southern Pacific Co. v. Gallagher,* 306 U.S. 167; *Oxford v. Blankenship* 127 S. E. 2d 706; and *McGoldrick v. Berwind-White Coal Mine Co.,* 309 U.S. 33.

Another point, not mentioned above, is that there is no problem here of multiplicity of taxation. No other state has imposed a sales or use tax on these trucks and trailers.

Lastly, reference should be made to Assistant Attorney General Richard A. Foley's

opinion dated December 22, 1960 which deals with the same situation and which reaches the same result.

WENDELL R. DAVIDSON
Assistant Attorney General

Lieut. Kenneth Wood, Traffic Div. June 14, 1968
State Police

Classification of Church Owned Buses

SYLLABUS:

Buses owned and operated by a Church solely for the purpose of transporting children to and from Sunday School and other Church functions are not "School Buses" as defined in 29 M.R.S.A. § 2011.

FACTS:

Two buses are being operated by a Church for the purpose of transporting children to Sunday School and other Church functions.

These buses meet all the requirements of School Buses as to color, lighting and signing. They have been submitted to a School Bus approved Inspection Station for the purpose of complying with Par. 9 of Section 2011.

The Church authorities have been advised by DMV that they do not have to comply with Sect. 2012 (School Bus Operator's Requirements) as the vehicles are not school buses.

QUESTION:

Whether under the above stated facts, Church owned and operated buses used for transporting children to Sunday School and to other Church functions are to be considered "School Buses" as defined in 29 M.R.S.A § 2011?

ANSWER:

No.

OPINION:

20 M.R.S.A. § 2011 reads in part as follows:

"The term 'school bus' includes every motor vehicle with a carrying capacity of 10 or more passengers, owned by a public or governmental agency or private school and operated for the transportation of children to or from school, or to or from any school activities at a school regularly attended by such children, or privately owned and operated for compensation for the transportation of children to or from school or to or from any school activities at a school regularly attended by such children, or to and from any municipally sponsored, nonschool activity within the State for which use of a bus has been approved by the superintending school committee, community school committees or board of directors; school as used in this sentence shall mean either a private or public

school. Buses operated by a motor carrier having a certificate of public convenience and necessity issued by the Public Utilities Commission under Title 35, Sections 1501 and 1518, which comply with the requirements of the Commission shall not be regarded as 'school buses.' "

It is clear from the foregoing language that the legislature did not contemplate the inclusion of buses operated by Churches for Sunday School and other Church activities. The language designates that the motor vehicle must be used for "school activities at a school regularly attended by such children" or for a "municipally sponsored, non-school activity." Even the most liberal reading of this language does not include Church owned buses. It appears that the legislature was careful to exclude church operated buses.

JOHN N. KELLY
Assistant Attorney General

June 18, 1968

F. S. McGuire, Director
Department of Physical Plant
University of Maine
Orono, Maine 04473

Dear Mr. McGuire: Re: Combining of Bond Issue Funds for Buildings

SYLLABUS:

Bond issues may be combined for construction purposes when (1) language in one or both bills permits and (2) there is a relationship in the uses of the buildings to be constructed.

FACTS:

Chapters 183 and 190 of the P & S laws of 1967 authorized the construction of a Research and Advanced Study Building and a Law School respectively, both to be located in Portland, Maine. The State appropriation ($920,000) for the Law School project appears to be insufficient to provide a durable building of the size needed. In searching for a solution to the dilemma, consideration is being given to the feasibility of combining the Law School and Research and Advanced Study Center in a single building. Both disciplines are in the graduate area.

It has been determined that many areas can be used in common and yet it is architecturally possible to achieve physical separation where such is necessary. Moreover, a combined facility quite likely can be constructed more economically.

One approach would be common use of the basement (utilities, including heating plant, storage areas, snack bar, etc.). The first and second floors would be occupied by the Law School because of student traffic volume. The third floor could contain libraries of both disciplines (but separated), seminar and conference rooms and a large lecture room or auditorium. The fourth, fifth and sixth floors would be alloted to the Research and Advanced Study Center. This latter activity may have a somewhat modest beginning, and so as it grows it can be expected to recapture any space temporarily occupied by the Law School. As need arises for more Law School space, the University will have to seek authorization to add to the building lower levels. Current design would recognize this eventuality.

It is known that both activities will frequently be researching in common fields such as human resources and oceanography. It thus seems very desirable from several viewpoints for both to be under one roof.

QUESTION:

May the proceeds from the two bond issues be combined to build one building housing the two schools?

ANSWER:

Yes.

REASON:

The answer to this question must be found within the framework of the two bond issue acts. P. & S. L. 1967, Chapter 183, was enacted during the regular session. It was ratified by the people at a special election on September 12, 1967 and duly proclaimed by the Governor. This Act authorized the construction of a research and advanced study building for the University of Maine at Portland and the issuance of bonds not exceeding $1,800,000.

P. & S. L. 1967, Chapter 190, was enacted at the first Special Session in October 1967. It was ratified by the people on November 5, 1967 and duly proclaimed by the Governor. This Act authorized issuance of bonds for certain facilities for the University of Maine. One such facility was a Law School Building in Portland in the amount of $920,000.

An examination of Chapter 190 reveals no unusual provisions. It contains the standard language of most bond issues. It does provide for 7 different capital improvements for the University of Maine.

In Chapter 183 there are some unusual features. Section 8 reads:

> "This Act shall not in any manner preclude the university from obtaining construction funds in any other ways or from any other sources; or from accepting from any authorized agency of the Federal Government loans or grants for the planning, construction or acquisition of any project; or from entering into agreements with such agency respecting any such loans or grants."

This type of provision is not usually found in bond issue Acts. It is not even indirectly included in Chapter 190 involving the Law School. Some of this language would allow the combining of the two sums to build one building.

Certainly, money authorized for the Law School building can be said to be "construction funds . . . from any other source (s) " as it applies to the Research and Advanced Study building.

Also, one should bear in mind that a Law School, properly administered, will in large part devote itself to research and advanced study. Thus, the two areas are somewhat akin and it would not be stretching too much to have the two proposed buildings joined into one.

The main limitation which must be applied is the proportion of money involved. As set forth in the Facts, the building should be apportioned as to use in proportion to the money available to each purpose.

Very truly yours,
GEORGE C. WEST
Deputy Attorney General

June 19, 1968
Secretary of State

Joseph T. Edgar, Secretary of State

Removal of License Plates from Motor Vehicles by Secretary of State

SYLLABUS:

The Secretary of State, through his agents, may reclaim license plates from motor vehicles whose owners have had their registrations revoked for failure to comply with the Motor Vehicle Financial Responsibility Law. This can be done only after demand and no physical force should be exerted against any individual. The fact that one of a number of co-owners has not complied with said Financial Responsibility Law does not change these results.

FACTS:

The Secretary of State has on occasion instructed his agents to reclaim license plates from motor vehicles. The orders for removal have been predicated on the failure of owners to return the plates after demand from the Secretary of State, the demand having been based on revocation of the owners' registration certificates due to a failure on the owners' part to comply with 29 M.R.S.A. § 781 et seq. (Motor Vehicle Financial Responsibility Law).

Often times the owners of the vehicles are not at home when the agents call at their residences to pick up the plates. However, the motor vehicles in question are often outside in full view of the agents.

Sometimes the motor vehicles in question are registered to two or more co-owners, only one of whom has failed to comply with 29 M.R.S.A. § 781 et seq.

QUESTIONS:

1. Do the agents in question have a right to remove these license plates in the absence of the owners?
2. To what extent should force be used in removing these plates?
3. Does the fact that in some circumstances only one of a number of co-owners has failed to comply with 29 M.R.S.A. § 781 et seq. change the result in questions No. 1 and No. 2?

ANSWERS:

1. Yes.
2. See Reasons.
3. No.

REASONS:

That the Secretary of State has the right to reclaim these license plates, after revocation of registration and demand, is clear from 29 M.R.S.A. § 113:

> "All registration number plates, issued by the Secretary of State, shall continue to be the property of the State, and the person to whom the same are

issued shall surrender the same on demand of the Secretary of State whenever his registration certificate is suspended or revoked or has expired without renewal. Whoever steals, takes or carries away any registration number plate from any person entitled to its possession shall be punished by a fine of not more than $100 or by imprisonment for not more than 90 days, or by both."

Since the plates are the property of the State, its agents may remove them even in the absence of the owners of the vehicles in question. The second sentence of § 113 quoted above is not applicable to these agents since the State owns these plates.

There should never be any physical force exerted on any individual to effect this removal. However, whatever force that is reasonable under the circumstances can be used to physically remove the plates from the vehicle.

The fact that one of the co-owners has failed to comply with 29 M.R.S.A. § 781 et seq. does not change these results. When a person co-registers a vehicle with another, he must abide by the laws as they pertain to the other co-registrants.

WARREN E. WINSLOW, JR.
Assistant Attorney General

June 24, 1968
Executive

Herbert S. Sperry, Director, OEO

Maine Housing Authorities Act

SYLLABUS:

Though, under some circumstances, Maine municipalities may act as Lessor or Lessee of real property, in general neither counties nor municipalities in this State possess the broad range of powers conferred upon local housing authorities by 30 M.R.S.A. §§ 4551-4755 (1964).

FACTS:

The Legal Department of the Regional Office of the Department of Housing and Urban Development has presented through your office the following questions for answer:

QUESTION NO. 1:

Do Maine municipalities and/or counties have the power to lease housing units from a private corporation and then sublet such housing units to low-income families resident within the governmental unit?

QUESTION NO. 2:

Do Maine municipalities and/or counties possess powers equivalent to those granted local housing authorities under and by virtue of the following statutes: 30 M.R.S.A. § 4651(1) (1964); 30 M.R.S.A. § 4651(3) (1964); 30 M.R.S.A. § 4651(4) (1964) and 30 M.R.S.A. § 4701 (1964)?

QUESTION NO. 3:

If the answers to Questions No. 1 and No. 2 are in the affirmative, may a municipality and/or county enter into financial assistance contracts with the Federal Government without the necessity of town meeting or voter referendum approval?

ANSWER NO. 1:

I. Municipalities.

All capacities, powers and duties of Maine municipalities are derived from legislative enactments. *Opinion of the Justices,* 161 Me. 182, 210 A.2d 683 (1965). There is no state statute which purports to empower Maine municipalities to lease housing units from private corporations and then sublet such housing units to low-income families resident within the municipality. It may be that by virtue of a provision in its charter, a municipality has such power, and reference should be had to the records of particular municipalities for further determination.

We also point out the existence of the Maine Housing Authorities Act, 30 M.R.S.A. §§ 4551-4755 (1964), and note that the existence of this Act may constitute a legislative pre-emption of municipal powers with respect to housing and a delegation of the entire housing problem to local housing authorities for solution. See the language in 30 M.R.S.A. § 4553 (1964): "It is declared . . . that these (blighted) areas in the State cannot be cleared, nor can the shortage of safe and sanitary dwellings for persons of low income be relieved through the operation of private enterprise . . .". *Cf. Drake v. City of Los Angeles,* 38 Cal. 2d 872, 243 P.2d 525 (1952), where the court stated: "The local law governing the acts and authority of the city council as to slum-clearance and low-rent housing projects has been superseded by the (California Housing Authorities Law)." 38 Cal. 2d 872, 874, 243 P.2d 525, 526.

II. Counties.

With respect to counties of a sister state which were organized in fashion similar to Maine, it has been held that such counties have no powers not conferred by the state legislature. *Opinion of the Justices,* 99 N.H. 540, 114 A.2d 879 (1955). Maine counties are mere political subdivisions of the state. *Cf.* 1 M.R.S.A. § 7 (1964). Therefore, absent a grant of legislative power to act in manner contemplated by the question posed, a Maine county is devoid of authority to so act. We find no such legislative grant.

ANSWER NO. 2:

30 M.R.S.A. § 4651(1) (1964) empowers housing authorities:

> "To sue and to be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority; and to make and from time to time amend and repeal bylaws, rules and regulations not inconsistent with this subchapter, to carry into effect the powers and purposes of the authority."

With the above provision, compare 30 M.R.S.A. § 1902 (1964):

> "The residents of a municipality are a body corporate which may sue and be sued, appoint attorneys and adopt a seal."

Municipalities have the power, through duly authorized agents, to enter into contracts which relate to the lawful exercise of their corporate powers as defined in their charters. *Cf. School Administrative Dist. No. 3 v. Me. School Dist. Comm'n.,* 158 Me.

420, 185 A.2d 744 (1962). The making of bylaws by an authority is analogous to the adoption of municipal ordinances. The ordinance-making powers of municipalities are found at 30 M.R.S.A. § § 2151-2155 (1964).

There are no statutory grants to Maine counties of powers similar to those granted housing authorities under the statute first above cited.

There are no statutory provisions giving Maine counties or municipalities those powers granted to housing authorities under 30 M.R.S.A. § 4651(3) (1964). The power of municipalities to contract generally has been set out above.

There are no statutory provisions giving Maine counties or municipalities the powers, or imposing the conditions, of 30 M.R.S.A. § 4651(4) (1964). The power of municipalities to contract generally has been set out above.

A municipality may appropriate money for the purchase of real and personal property from the Federal Government. 30 M.R.S.A. § 5109 (3) (Supp. 1967). A municipality may also apply for and accept federal grants for any purpose for which federal grants are made available to municipalities either directly or through the State. 30 M.R.S.A. § 5109 (1) (Supp. 1967). Only to such extent does a municipality have powers similar to those given to housing authorities under 30 M.R.S.A. § 4701 (1964). Counties have no such powers.

ANSWER NO. 3:

Since we have, in effect, answered Questions No. 1 and No. 2 in the negative, we therefore consider Question No. 3 moot.

ROBERT G. FULLER, JR.
Assistant Attorney General

July 18, 1968
Economic Development

Stanley Shalek, Adm. Assist.

Trade Discount on a State Publication

SYLLABUS:

A state department cannot sell publications which are the result of the expenditure of public funds absent statutory authority to do so.

FACTS:

In your memorandum submitted to this office under date of June 19, 1968, it is stated that the Department of Economic Development has announced publication of a "Maine Statistical Abstract". To recuperate part of the cost of printing and distribution involved, the Department has established a price of $3.00 per copy for said publication. A book vendor has requested a trade discount, so that he may realize a profit in offering said state publication for sale. It is stated that all funds received from the sale of the publication will be placed in the General Fund. You have asked two questions relative to the proposed sale of the "Maine Statistical Abstract".

QUESTION NO. 1

Is there a state statute which prohibits selling a state publication at a discount rate?

ANSWER:

No, see opinion.

QUESTION NO. 2:

Is there a limitation on the amount of a discount which may be allowed to a retailer of state publications

ANSWER:

No, see opinion.

OPINION:

The answers to the above-stated questions are rendered moot by the answering of a question not asked in your memorandum, and that is: "May the Department of Economic Development print and distribute for sale to the general public a publication, absent express statutory authority to do so?" We answer said question in the negative.

The Commissioner of the Department of Economic Development is authorized to establish a price for publications of the Maine Geological Survey which may be sold and delivered and also for certain United States Government Publications, 10 M.R.S.A. § 651. There is no statutory authority which provides that the Commissioner may authorize the sale of any other publications prepared by the Department, however. This being the case, we fail to see how the "Maine Statistical Abstract" can be offered for sale by the Department.

It is true that certain state departments do offer publications for sale. For example, P. L. 1965, c. 101 (12 M.R.S.A. § 1965) gave the Commissioner of Inland Fisheries and Game the authority to affix price tags to certain publications of that Department. However, absent the statutory authority set forth in P. L. 1965, c. 101, the Commissioner of Inland Fisheries and Game would not possess the implied authority to offer departmental publications for sale.

PHILLIP M. KILMISTER
Assistant Attorney General

July 25, 1968
Personnel

Willard R. Harris, Director

Effect of Me. Public Laws 1967, ch. 542 upon the operation of the Personnel Law.

SYLLABUS:

Me. Public Laws 1967, ch. 542, giving the Governor and Council authority to adjust

the salaries of certain classified positions above the maximum presently set by the Personnel Board, does not remove such positions from the classified service; but the grant of such authority to the Governor and Council supersedes the Board's authority granted under 5 M.R.S.A. § 634 (Supp. 1967) to fix maximum salaries for the subject positions.

FACTS:

The posts of Director of State Parks and Recreation, and Manager of the Maine State Ferry Service were created as positions within the classified service of the State. The Personnel Board is by law directed to adopt compensation plans for classified positions. 5 M.R.S.A. § 634 (Supp. 1967). The law further provides (with certain exceptions not here pertinent) that no classified position shall be assigned a salary greater than the maximum rate so fixed by the Board, and that salaries which do not conform to the adopted compensation plan shall not be approved by paying authorities. *Ibid.*

1967 Me. Public Laws, ch. 542, however, provides that, notwithstanding any other provision of law, the Governor, with the advice and consent of the Council, is authorized to adjust the salary of the Director of State Parks and Recreation to no more than $16,500. and the salary of the Manager of the Maine State Ferry Service to no more than $12,000.

QUESTION:

Does Me. Public Laws 1967, ch. 542 remove the positions of Director of State Parks and Recreation and Manager of the Maine Ferry Service, from the classified service?

ANSWER:

No. However, in the event that the salaries of such positions are adjusted by the Governor and Council above the maximum presently set by the Personnel Board, such adjustment prevails.

OPINION:

The provisions of Me. Public Laws 1967, ch. 542, giving the Governor and Council power to adjust the salaries of the Director of State Parks and Recreation, and the Manager of the Maine State Ferry Service, above the maximum set by the Personnel Board, are in outright conflict with the pre-existing provisions of 5 M.R.S.A. § 634 (Supp. 1967) which purport to lodge complete authority over salaries of classified personnel in the Board.

The rule to be followed in such a circumstance has been stated by the text writers as follows:

> "When a subsequent enactment covering a field of operation coterminous with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict." (Citations omitted.) 1 Sutherland, *Statutory Construction* (3d ed. 1943) § 2012.

See also 82 C.J.S. *Statutes* § 291 (1953):

> "Where two legislative acts are repugnant to, or in conflict with, each other,

the last one passed will, although it contains no repealing clause, govern, . . . so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy."

Our Supreme Judicial Court has adhered to these views in a long line of cases, the latest being *State v. London,* 156 Me. 123, 162 A.2d 150 (1960) where the Court said:

"Where a later statute does not cover the entire field of the earlier statute but is inconsistent or repugnant to some of its provisions, a repeal by implication takes place to the extent of the conflict." 156 Me. 123, 128 162 A.2d 150, 153.

The 1967 law does not conflict with the entire Personnel Law, so-called [5 M.R.S.A. § § 551-741 (1964)], but only with the provisions of 5 M.R.S.A. § 634 (Supp. 1967). To the extent of such conflict, the later law governs. The classified status of the positions is not otherwise affected. The Legislature appears to have been aware of possible conflicts with prior law when it enacted ch. 542, for it is expressly provided that ch. 542 shall govern "[n]otwithstanding any other provision of law . . . .".

ROBERT G. FULLER, JR.
Assistant Attorney General

July 25, 1968
Education

Kermit S. Nickerson, Deputy Comm'r

Authority of Education Department to Administer P. L. 90-302

SYLLABUS:

Absent legislative acceptance of the benefits and provisions of a 1968 amendment to the previously accepted National School Lunch Act, the Department of Education is devoid of authority to administer the programs thereby created.

FACTS:

In 1946 the Congress passed the so-called National School Lunch Act. 60 Stat. 230. The following year the Maine Legislature accepted the provisions and benefits of this Act. Me. Public Laws 1947, ch. 127 [now codified as 20 M.R.S.A. § 1051 (1964)]. The accepting statute in its entirety reads:

"The State having accepted the provisions and benefits of the Act of Congress entitled 'An Act to Provide Assistance to the States in the Establishment, Maintenance, Operation and Expansion of School-Lunch Programs and for Other Purposes' approved June 4, 1946, will observe and comply with said Act."

In 1968, the President signed into Law an amendment to the National School Lunch Act which authorized Federal assistance to food services provided during the summer months to children at playgrounds and recreation centers, and to food services provided year-round to day-care centers and settlement houses. 82 Stat. 117.

The Department of Education administers the National School Lunch Act in Maine.

QUESTION:

May the Department of Education, as the state agency for the administration of the National School Lunch Act in Maine, also administer the provisions of the 1968 amendment to that Act?

ANSWER:

No.

OPINION:

The State has accepted only the provisions of the National School Lunch Act, as that Act was originally passed in 1946. The State has not yet accepted the 1968 amendment to that Act, and such amendment cannot be deemed impliedly accepted by virtue of the acceptance of the original Act. The general rule in such case has been stated as follows:

> ". . . [W]hen a statute adopts all or part of another statute, . . . by a specific and descriptive reference thereto, the adoption takes the statute as it exists and does not include subsequent additions or modifications of the adopted statute, where it is not expressly so declared." (Citations omitted.) 50 Am. Jur. *Statutes* § 39.

See also 168 A.L.R. 621, 631 for a collection of cases supporting this rule. *Cf. Collins v. Blake,* 79 Me. 218, 9 Atl. 358 (1887).

Accordingly, without legislative acceptance of the provisions and benefits of the 1968 amendment, the Department of Education is without authority to administer the programs thereby created.

ROBERT G. FULLER, JR.
Assistant Attorney General

August 1, 1968
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

SUBJECT: Snow Traveling Vehicles

SYLLABUS:

A SNOW TRAVELING VEHICLE IS A "MOTOR VEHICLE" FOR PURPOSES OF THE SALES AND USE TAX LAW.

FACTS:

Chapter 479 of the Public Laws of 1967, which became effective on July 1, 1968, is an act which regulates snow traveling vehicles.

In an Attorney General's opinion dated April 11, 1968, it was determined, for Excise Tax purposes, that snow traveling vehicles come within the definition of "motor vehicles" as set out in 36 M.R.S.A. §1481 (3), inasmuch as they are allowed to operate on the public highways, as defined in 23 M.R.S.A.

QUESTION:

Is a snow traveling vehicle to be considered a "motor vehicle" for the purposes of the Sales and Use Tax law?

ANSWER:

Yes.

LAW:

"The tax imposed by chapters 211 to 225 shall be levied upon all isolated transactions involving the sale of motor vehicles excepting those sold for resale, and excepting an isolated transaction involving a sale of motor vehicles to a corporation when the seller is the owner of a majority of the common stock of such corporation." 36 M.R.S.A. § 1764

"When one or more motor vehicles or farm tractors are traded in toward the sale price of another motor vehicle or farm tractor, the tax imposed by Chapters 211 to 225 shall be levied only upon the difference between the sale price of the purchased motor vehicle or farm tractor and the sale price of the motor vehicle or vehicles or farm tractor or tractors taken in trade, except for transactions between dealers involving exchange of farm tractors or motor vehicles from inventory." 36 M.R.S.A. § 1764

" 'Motor vehicle' means any self-propelled vehicle designed for the conveyance of passengers or property on the public highways." 36 M.R.S.A. § 1752 (7)

REASONS:

The Attorney General's Opinion of April 11, 1968, ruled that snow traveling vehicles are to be considered motor vehicles for Excise Tax purposes. The definition of a motor vehicle for purposes of the Sales and Use Tax act is similar to the definition of a motor vehicle under 36 M.R.S.A. § 1481 (3), and the opinion of April 11, 1968 is incorporated for the purpose of this opinion. Thus, snow traveling vehicles are "motor vehicles" within the meaning of 36 M.R.S.A. § 1752 (7).

Therefore, the term "motor vehicle" as it is employed in 36 M.R.S.A. § 1764 and 1765 includes snow traveling vehicles. Isolated sales of snow traveling vehicles will be taxable under § 1764. A trade-in credit will be allowed for snow traveling vehicles under § 1765.

WENDELL R. DAVIDSON
Assistant Attorney General

August 1, 1968

C. Edward Tenney, Captain
Maine Maritime Academy
Business Manager
Castine, Maine 04421

Dear Captain Tenney: Re: Maine Maritime Academy – Authority to Mortgage

SYLLABUS:

The Maine Maritime Academy, having powers given corporations organized under the general law, may place a mortgage upon its real estate.

FACTS:

Private and Special Laws 1967, Chapter 224 Chapter A, provides a bond issue to erect a dormitory at the Maine Maritime Academy. The Federal Government, through H. U. D., has made a grant to supplement the state funds plus Academy funds. It will be possible to build a larger facility.

H. U. D. must have security for its grant in the form of a mortgage on the dormitory and the land on which it stands.

QUESTION:

Does the Maine Maritime Academy have authority to mortgage its real estate?

ANSWER:

Yes.

REASONS:

The Maine Maritime Academy was created as the Maine Nautical Training School by P. & S. L. 1941, Chapter 37. Section 1 of that Act provides in part:

> " (it is) a body corporate and politic, having the same rights, privileges and powers as have corporations organized under the general law . . . . "

Corporations organized under the general law may "hold and convey lands and other property," 13 M.R.S.A. § 141. Therefore, the Maine Maritime Academy may give a mortgage on its property.

Very truly yours,

GEORGE C. WEST
Deputy Attorney General

August 1, 1968
Education

Kermit S. Nickerson, Deputy Comm.

Eligibility of Adopted Child to War Orphan Scholarship Because of Subsequent Service-Connected Death of Natural Parent.

SYLLABUS:

Adoption severs all legal relations between a child and his natural parents and disqualifies him of the right to a War Orphan Scholarship under the provisions of 20 M.R.S.A. §§3211 – 3214 by reason of the subsequent death of his natural father on active duty in the military service because of a service-connected disability.

FACTS:

20 M.R.S.A. §§ 3211 – 3214 provide for scholarship assistance to War Orphans. By definition these are children, not under the age of 16, whose father served in the military

or naval forces during certain conflicts and who was killed in action or died from a service-connected disability.

The applicant under consideration was legally adopted in 1956. Her natural father died in 1966, while on active duty, of a service-connected disability.

QUESTION:

Does a child, whose natural father died while on active duty of a service-connected disability, have a right to a War Orphan Scholarship when 10 years prior to the death she was formally adopted by foster parents

ANSWER:

No.

OPINION:

19 M.R.S.A. § 535, provides that by a decree of adoption, the natural parents are divested of all legal rights in respect to the child, who becomes, for all intents and purposes the child of his adopters and stands in the same position as if born to them in lawful wedlock.

The decree divests the natural parents of all legal relationship to the child, and divests the child of all rights in his natural parents except the right of inheritance. Consequently, the child in question did not retain any right to a War Orphan Scholarship by reason of the death of her natural father.

LEON V. WALKER, JR.
Assistant Attorney General

August 19, 1968
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

SUBJECT: The Attempt to Pass Property at Death in Contravention of the Statute of Wills

SYLLABUS:

AN ORDER TO DELIVER THE EQUITY IN AN INVESTMENT PLAN TO A SPECIFIED BENEFICIARY ON THE DECEDENT'S DEATH IS AN ATTEMPTED TESTAMENTARY DISPOSITION OF PERSONAL PROPERTY, AND IN ORDER FOR THE DISTRIBUTION TO BE VALID, IT MUST BE EXECUTED IN COMPLIANCE WITH TITLE 18 M.R.S.A. § 1.

FACTS:

The decedent died intestate leaving heirs at law. The estate is in the process of probate, an administratix having been appointed. An inventory and statement of deductions has been filed with the Inheritance Tax Division.

One of the assets of the estate is equity in an investment plan established by

individual employees of Bath Iron Works Corp. The only record of decedent's participation in the investment group is a card prepared by the individual who keeps the records of the group. The mother of the decedent is listed on the card as beneficiary. There is no signed agreement or instrument prepared by the decedent, signed by him or witnessed, which purports to dispose of the equity in the investment group upon his death.

QUESTION:

Is the reference naming of a beneficiary sufficient to pass the property to the designated beneficiary?

ANSWER:

No, the property passes through the estate. 18 M.R.S.A. § 6.

LAW:

"A person of sound mind and of the age of 21 years and a married person, widow or widower of any age may dispose of his real and personal estate by will, in writing, signed by him, or by some person for him at his request and in his presence, and subscribed in his presence by three creditable attesting witnesses . . . . " 18 M.R.S.A. §1.

REASONS:

The Supreme Judicial Court stated in *Savings Bank v. Mahoney,* 121 Me. 49 (1921), at page 51:

> "There is but one way of making a testamentary disposition of property and that is by will; the Statute of Wills was invented and adopted for the express purpose of establishing a legally defined procedure to be employed in giving post-mortem effect to an anti-mortem disposal of property."

Title 18 M.R.S.A. §1, often referred to as the Statute of Wills, clearly sets forth the criteria for the disposition of one's real and personal estate by will. The document must be "in writing, signed by him, or by some person for him at his request and in his presence, and subscribed in his presence by three creditable attesting witnesses."

The document which purports to transfer title to the decedent's equity in the investment plan at his death, although testamentary in character, is an evasion of 18 M.R.S.A. § 1. It is neither signed by the decedent, nor subscribed in his presence by three creditable attesting witnesses.

Certain property can be the subject of a testamentary disposition even though it does not pass under the terms of a valid will. Examples of this is found in the area of joint bank accounts and the proceeds of life insurance policies; however, there is no statutory exception for the situation involved herein.

WENDELL R. DAVIDSON
Assistant Attorney General

September 4, 1968
Water and Air Environmental
Improvement Commission

R. W. Macdonald, Chief Engineer

Performance bonds.

SYLLABUS:

The Water and Air Environmental Improvement Commission may not, as a condition precedent to issuance of a waste discharge license, require the applicant to post a bond for the performance of such acts as the Commission deems necessary to protect the classification of the waters affected by the proposed discharge.

FACTS:

Applicants for waste discharge licenses are quite often unprepared, at the hearings on their applications, to discuss in depth the effect of their proposed discharge on the classification of the receiving body of water. However, such applicants, with equal frequency, claim that after they are licensed they will take any remedial steps later found necessary by the Commission to protect the classification. The Commission wishes to know whether it may condition the issuance of a waste discharge license upon execution of a bond by the applicant binding him to perform such acts as the Commission deems necessary to protect the classification.

QUESTION:

May the Water and Air Environmental Improvement Commission require, as a prerequisite to issuance of a waste discharge license under 38 M.R.S.A. § 414 (1964), that the applicant post a bond conditioned upon such applicant's faithful performance of such acts as the Commission deems necessary to protect the classification of the receiving body of water?

ANSWER:

No.

OPINION:

38 M.R.S.A. § 414 (3) (1964) states in pertinent part:

> "Any license to so discharge granted by the Commission may contain such terms and conditions *with respect to the discharge* as in the Commission's determination will best achieve the (classification) standards . . . " (Emphasis supplied.)

This section admits of no other interpretation but that the Commission may, in granting a waste discharge license, impose *only* conditions relating to the discharge, such as volume, hydrogen-ion concentration and biochemical oxygen demand limitations, designed to maintain the classification of the receiving body of water.

ROBERT G. FULLER, JR.
Assistant Attorney General

September 4, 1968
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

SUBJECT: Taxation of jet fuel sold from federally bonded storage facilities.

SYLLABUS:

JET FUEL IMPORTED, STORED AND EXPORTED "IN BOND" IS NOT SUBJECT TO TAXATION BY THE STATE OF MAINE.

FACTS:

You have inquired whether the Maine Gasoline Tax, 36 M.R.S.A. §§ 2901-2913 applies to jet fuel withdrawn from federally bonded storage at Bangor International Airport and used in international carriers.

We have received an outline of anticipated operations by Humble Oil and Refining Company part of which is quoted as follows;

"The city of Bangor arranged for customs people to be assigned to Bangor International Airport on July 1, 1968. Humble will lease storage facilities at the International Airport and title to the fuel will remain in Humble until it is delivered to an eligible airline flight. There will be separate storage and handling facilities for bonded and domestic jet fuel at Bangor. All bonded fuel will be subject to supervision and control of customs officials insuring compliance with the Tariff Act of 1930 (See 19 USCA Sections 309, 311) and related regulations, which provide freedom from internal revenue taxes and custom duties on supplies withdrawn from bonded storage when sold for use as fuel in certain vessels and aircraft. Humble will have required bonds on deposit which will be conditioned upon compliance with laws and regulations relating to the custody and safekeeping of the bonded products and to its proper withdrawal and ultimate use as fuel supplies.

1. Bonded tank truck delivery from our Everett, Massachusetts, bonded storage.

2. Tanker to Searsport, Portland, or Bucksport, Maine; pipeline delivery from Searsport or Portland to Bangor; tank truck delivery from Bucksport to Bangor.

3. Barge deliveries from Everett to Bangor.

Whichever delivery method is finally employed, our operations will be subject to and in accordance with applicable customs regulations governing bonded operations. Such operations are mainly controlled by Parts 18 and 19, Volume 19, of the Code of Federal Regulations. These detailed provisions completely cover the entire handling process of bonded products, depending upon the circumstances of each operation, and insure strict control by the Customs Service."

It appears that all fuel used in the manner described above will be imported to the State of Maine in bond and exported under federal control and supervision.

QUESTION:

Whether jet fuel imported, stored and exported "in bond" is subject to Maine taxes.

ANSWER:

No.

REASONS:

A state is prohibited from taxing imports or exports. *Constitution of the United States, Article I, Section 10.* The nature of the fuel to be the subject of sales at the Bangor International Airport is such that prior to its entry into the State of Maine and during the time of storage and withdrawal it is under the control and supervision of the United States Customs Service and subject to federal law and regulations. *19 USCA Section 309 and 311. 19 CFR Parts 18 and 19.* The property is treated pursuant to federal law as being in a constant state of exportation and therefore is said never to come to rest within the State of Maine. Since the fuel travels "in bond" upon its importation into the state, it never becomes a part of the common mass of property subject to taxation in the state. See *McGoldrick v. Gulf Oil Corporation;* 309 U.S. 414 (1940).

In order for the Excise Tax on gasoline to apply in this situation there must be a use or sale of the fuel in Maine. See *36 M.R.S.A. § § 2903, 2902 (3).* Since there is no use or sale in Maine the fuel is not subject to the gasoline tax.

For the same reasons, the fuel is not subject to the Sales and Use Tax Law provisions of 36 M.R.S.A. §1760 (8).

Neither is the fuel subject to property taxation while in the process of exportation.

CONCLUSION:

Property imported stored and sold in bond is therefore not subject to state taxation until such time as the property comes to rest within the state and can be considered part of the common mass of property subject to taxation.

JAMES M. COHEN
Assistant Attorney General

September 30, 1968
Water and Air Environmental
Improvement Commission

Henry Mann, Chemist

Enforcement of Water Improvement Timetables.

SYLLABUS:

Dischargers, into water reclassified after January 1, 1967, face administrative enforcement action by the WAEIC if they fail to comply with applicable cleanup timetables. The Commission has no power to extend the dates within which such compliance may be had, but, after notice and hearing, may order compliance with an accelerated timetable.

FACTS:

The state legislature has recently reclassified upward several bodies of water (*e.g.*, C to B-2) and in connection with the reclassification has provided that no discharge to the reclassified waters shall be deemed in violation of the new classification if such discharger takes certain steps by certain dates so that the discharge will meet the new classification. See, for example, 38 M.R.S.A. § 451 (1) (Supp. 1967). In connection with these legislative timetables you ask two questions:

QUESTION NO. 1:

If a discharger fails to fully perform its timetable obligations on the date required by statute, what is the procedure for enforcing compliance?

QUESTION NO. 2:

Does the Commission have the power to extend or modify timetable schedules?

ANSWERS:

1. See Reason.
2. No.

REASON:

The Commission must first give notice to and hold a hearing with the parties affected by the reclassifications, and issue to them special orders requiring such operating results as are necessary to achieve the interim goals of the timetable. See 38 M.R.S.A. § 451 (1) (Supp. 1967). If the goals are not achieved, then the Commission must take administrative action under 38 M.R.S.A. § 451 (2) (Supp. 1967). The procedure under this section, briefly, involves notifying the discharger of the alleged violation, summoning him in, hearing evidence, and, if the violation is found to exist, issuing an administrative order compelling compliance. If the order is not complied with within the time specified, the Commission must notify this department which must then seek judicial relief.

The Commission has no statutory authority to extend the dates of compliance with existing timetables. However, it does have the authority, after notice and hearing, to compel a discharger to meet an accelerated compliance schedule. See 38 M.R.S.A. § 451 (1) (Supp. 1967).

ROBERT G. FULLER, JR.
Assistant Attorney General

October 7, 1968
Water and Air Environmental
Improvement Commission

Henry Mann, Chemist

Sections 414 and 451 of Title 38 of the Revised Statutes.

SYLLABII:

A timetable for classification standards applicable to waters classified on or after January 1, 1967 operates prospectively and does not amend or retroactively affect other previously existing timetables applicable to bodies of water classified prior to January 1, 1967.

Municipal and quasi-municipal corporations which discharge sewage from outfalls existing on September 1, 1959 into unclassified bodies of water need not obtain a license as a condition precedent to the discharge of said sewage.

FACTS:

The 103rd Legislature enacted legislation (P.L. 1967, c. 475) which set forth a timetable applicable to polluters located on bodies of water classified or reclassified on or after January 1, 1967. Prior to the enactment of P.L. 1967, c. 475 the Legislature had established timetables applicable to several classified bodies of water. You ask in essence whether the timetable set forth in P.L. 1967, c. 475 repeals or changes the terms of previously existing timetables.

Your second major question concerns the interpretation of the statutory language contained in 38 M.R.S.A. § 414 (2) entitled "Unclassified waters". The phrasing of your question sufficiently sets forth the factual situation upon which your question is based.

QUESTIONS:

1. Does the legislative timetable established by the terms of P. L. 1967, c. 475 repeal the terms of previously established legislative timetables?
2. Does the exception clause contained in 38 M.R.S.A. § 414 (2) apply only to municipalities and quasi-municipal corporations?

ANSWERS:

1. No.
2. Yes.

REASON:

The legislative timetable set forth in 38 M.R.S.A. § 451 as amended by P. L. 1967, c. 475 applies to those who contribute pollution to bodies of water classified or reclassified on or after January 1, 1967 by the Legislature. Other statutory time schedules imposed by the Legislature upon designated bodies of water classified prior to January 1, 1967 are not affected by the terms of section 451 as amended.

There is no implied repeal of the terms of previously established timetables brought about by the enactment of P. L. 1967, c. 475. It is perfectly logical for the Legislature to establish certain time schedules for pollution abatement applicable to waters classified or reclassified post January 1, 1967, and to leave intact by express statutory language, timetables applicable to bodies of water classified or reclassified prior to January 1, 1967.

The language of section 414 of Title 38 governing licensure of waste discharge into heretofore unclassified bodies of water is clear both as to general license provisions and exceptions thereto. Words used in statutory language should be given their plain, ordinary meaning.

The exception clause of Section 414, subsection 2, reads as follows:

"No license from the Commission shall be required of any municipality, sewer district or other quasi-municipal corporation to dispose of any sewage from outfalls or facilities existing on the first day of September, 1959."

This exception clause applies only to municipalities and quasi-municipal corporations.

The above-designated language "to dispose of any sewage from outfalls or facilities existing . . . " cannot be narrowly construed to mean only domestic sewage. Industrial waste carried through sewers operated by municipal and quasi-municipal corporations on September 1, 1959 would likewise fall within the broad umbrella of the exception clause.

PHILLIP M. KILMISTER
Assistant Attorney General

October 21, 1968
Dedimus Justice

Samuel S. Silsby, Jr.

Nonresident Taking Oath as Trustee of the University of Maine

SYLLABUS:

A Trustee of the University of Maine is not required to take the oath of office set forth in Article IX, Section 1, of the Constitution of the State of Maine.

FACTS:

A nonresident of Maine was commissioned as a trustee of the University of Maine by the Governor and Council on May 15, 1968 under P. & S. 1967, c. 229. In taking the oath prescribed under the Constitution of the State of Maine, Article IX, Section 1, the question was raised whether said oath applied in his case, declaring that he was a citizen of the United States, but not of the State of Maine. The terms of P. & S., 1967, c. 229 do not provide that trustees must be residents of the State of Maine.

QUESTION:

Is a Trustee of the University of Maine appointed to any judicial, executive, military or other office under this State?

ANSWER:

No.

REASON:

Certainly we can eliminate the areas of judicial, executive and military offices without great discussion. A trustee of the University holds no judicial or military office. Executive must relate to one of the three departments of state set forth in Article III.

This leaves "other office under this State" as the only basis for requiring an oath. What is an "office" as the word is used in the Constitution of the State? As stated in *Opinion of the Justices,* 3 Me. @ 483.

"We do not perceive any reason why the term 'office' should receive a construction in one section different from that which seems proper and natural in another."

Another quote from the same *Opinion of the Justices* indicates the meaning of "office" as that word is used in the constitution.

"We apprehend that the term 'office' implies a delegation of a portion of the sovereign power to, and possession of it by the person filling the office; and the exercise of such power within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed, may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still it is a legal power, which may be rightfully exercised, and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the State. An employment merely has none of these distinguishing features. A public agent acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the acts performed the authority and power of a public act or law. And if the act be such as not to require such subsequent sanction, still it is only a species of service performed under the public authority and for the public good, but not in the execution of any standing laws, which are considered as the rules of action and the guardians of rights. By giving this construction to the term 'office,' the meaning of the first section of the ninth article and fourth part of the constitution appears plain, and the word office therein contained becomes intelligible as to the extent of its import.

"An office being a grant and possession of a portion of the sovereign power, it is highly proper that it should be guarded from abuse as far as possible; and to this end, that every person holding an office should be under the obligation of the oath in that section specified. It appears then, that every 'office,' in the constitutional meaning of the term, implies an authority to exercise some portion of the sovereign power, either in making, executing or administering the laws."

We do not perceive that a Trustee of the University of Maine is clothed with the power to "exercise some portion of the sovereign power" of the State. He is no different from a director or trustee of any nonstock corporation receiving public funds. See P. & S.L. 1967 c. 154 "Charitable Institutions."

We must bear in mind that the University of Maine is only a legislative chartered nonstock corporation. 20 M.R.S.A. § 2252 (enacted 1945) which, in substance, states that the University of Maine is an agency of the State for the purpose for which it was established does not change the status of the University.

The case of *Orono v. Sigma Alpha Epsilon Society* 105 Me. 214 (1909) has not been overruled. 20 M.R.S.A. § 2252 was not enacted to change that decision. The legislature would not wait 35 years to do that. Had it wished to change the decision it would have done so at the next session in 1911. (See opinion dated April 30, 1945, attached hereto, giving purpose of enactment of the statute. Also note the difference between Trustees of the University of Maine and members of the State Board of Education.)

We conclude that a Trustee of the University of Maine does not hold an "office under this State" and consequently is not required to take the oath set out in Article IX, Section 1, of the Constitution.

GEORGE C. WEST
Deputy Attorney General

October 23, 1968
Maine State Liquor Commission

Keith H. Ingraham, Chairman

Ruling on cash sales in State Liquor Stores

SYLLABUS:

The word "cash" may not be extended to cover payments at State Liquor Stores made by credit cards, Bancardchecks, gift certificates or any other form of postponed payment.

FACTS:

The Liquor Commission has been asked periodically to allow people to make purchases through various means such as gift certificates and credit cards. Presently the Commission has been asked to allow use of Bancardchecks. Title 28, sec 55 sub-sec. 6 states that the Commission shall have the duty "To sell – – for cash". The Commission also has as a matter of policy, accepted travelers checks.

QUESTION:

May the Commission accept forms of payment at state liquor stores, other than legal tender such as Bancardchecks, credit cards, gift certificates and the like?

ANSWER:

No.

OPINION:

The Legislature in drafting the act covering the purchase and sale of liquor was quite insistent that all transactions involving liquor must be made on the basis of the product being paid for at the time of sale. All through the statute the Legislature indicates that it wanted no credit extended whether it is the State that is making the sale, the distributor selling to the wholesaler, the wholesaler dealing with the retailer or the retailer making a sale to the consumer. Periodically the Legislature has revised the law to conform with current commercial practices. It has not done so in 28 MRSA Sec. 55 sub-sec. 6.

> Ballentine defines "cash": as "Ready money or money in hand either in current coin or other legal tender or in bank bills or checks paid and received as money". It further states, "In the absence of evidence of a usage or custom to the contrary, a sale on credit cannot be regarded as a sale for cash".
>
> Cash has also been defined as " – money, but it is frequently used as a term meaning the opposite of credit". *Hertwig v. Rushing* 182 P. 177.
>
> Term "cash" is antonym of credit but includes coins and currency, cashiers checks and certified checks recognized by banks as appropriation of amount specified to named payee. *Greenberg v. Alter Co.* 255 Iowa 899.

In other words while some definitions extend the word "cash" to include *some form of checks* all definitions point to the fact that "cash" is the direct opposite of "credit". And where the Legislature has been most insistent that, except in very few instances, the

transactions dealing with liquor must be for cash, it is very obvious that the Commission may not accept a credit card, Bancardcheck, gift certificate or any other form of postponed payment in place of cash.

FREDERICK P. O'CONNELL
Assistant Attorney General

October 31, 1968
Education

Kermit S. Nickerson, Deputy Commissioner

Subsidy for pre-school handicapped children

SYLLABUS:

The Commissioner of Education, with the approval of the state board, may make rules and regulations governing the education of pre-school speech-defective children. Special-education programs for such children which have been approved by the state board are eligible for subsidy.

FACTS:

20 M.R.S.A. §§ 3111-3119 (1964) are concerned with the education of physically handicapped and exceptional children. 20 M.R.S.A. § 3111 (1964) states the purpose of the sections as follows:

> "The purpose of this chapter is to provide educational facilities, services and equipment for all handicapped or exceptional children below 21 years of age who cannot be adequately taught with safety and benefit in the regular public school classes of normal children or who can attend regular classes beneficially if special services are provided."

20 M.R.S.A. § 3113 (1964) in part provides:

> "He (the Commissioner of Education) shall employ . . . such qualified personnel as may be needed . . . to . . . approve . . . a program of special education for handicapped or exceptional children. The commissioner, with the approval of the state board, shall make necessary rules and regulations for the proper administration of this chapter."

20 M.R.S.A. § 859 (1964) prohibits admission of children into the public school system who have not reached a certain age.

In the light of these statutes, you ask the following questions:

QUESTIONS:

1. May the commissioner make rules and regulations concerning the education of speech-defective children below the minimum age limits of 20 M.R.S.A. § 859 (1964)?
2. Are approved special education programs for speech-defective children below the minimum age limits of 20 M.R.S.A. § 859 (1964) eligible for state subsidy?

ANSWERS:

1. Yes.

2. Yes, provided the program meets the criteria of 20 M.R.S.A. §3115 (Supp. 1968).

REASONS:

1. 20 M.R.S.A. §3111 (1964), as noted earlier, states that the purpose of the entire chapter on education of physically handicapped or exceptional children is to "provide educational facilities, services and equipment for all (such) children below 21 years of age . . . ". We conclude that if the children meet the standards of §3111 and §3112, their age (as long as it is below 21) is immaterial. Therefore, the commissioner has jurisdiction to promulgate rules and regulations to properly administer the statute as it applies to such children, no matter what their age.

2. Appropriations made under the statute are to be paid according to 20 M.R.S.A. § 3115 (Supp. 1968). This statute is self-explanatory, and provides, *inter alia,* that subsidies are to be paid to designees of the commissioner for special-education programs approved by the state board. The age limitations of 20 M.R.S.A. § 859 (1964) are immaterial for the reasons advanced in support of Answer No. 1, *supra.*

ROBERT G. FULLER, JR.
Assistant Attorney General

November 7, 1968
Federal-State Coordinator

Walter E. Corey, III

Foreign-Trade Zones Enabling Act

SYLLABUS:

The portion of the Maine Foreign-Trade Zones Enabling Act, Me. Priv. & Spec. Laws 1963, ch. 178, which prohibits consignors or consignees of goods within the zone from owning warehouses therein, does not apply to an oil company, which proposes to erect storage tanks in the zone for storage of its own oil.

FACTS:

The Maine Port Authority proposes to establish a special-purpose foreign-trade sub-zone at Machiasport, Maine. An oil company has expressed interest in leasing space in the sub-zone and erecting storage tanks to be used for storage of such company's crude oil pending refining, and for its refined products pending sale.

The next-to-last sentence of the Foreign-Trade Zones Enabling Act reads: "The warehouse in which said goods, wares or merchandise are stored shall not be owned, either in whole or in part, by either the consignee or the consignor."

QUESTION:

Would the proposed activities of the oil company in the sub-zone violate the cited provisions of the Act?

ANSWER:

ANSWER:

No.

OPINION:

An oil storage tank is not a "warehouse" within the meaning of the Act. The term "warehouse" is elastic and its definition depends on the context in which the term is used. See generally 93 C.J.S. *Warehousemen & Safe Depositaries* 1(b); cf. *Owen v. Boyle,* 11 Me. 47, 60 (1842). In the context of the Act, it appears that the term was intended to embrace facilities where goods are received for storage upon a fee. The thrust of the cited language of the Act is to ensure that facilities of this type will in fact be owned and operated by independent warehousemen and not by the consignee or consignor of the goods. Since the oil storage tanks are not intended to be used for the storage of the oil of others at a price, but solely for the storage of the owning company's products, they are not "warehouses" which the Act protects.

ROBERT G. FULLER, JR.
Assistant Attorney General

December 12, 1968
Governor's Committee on
Pollution Abatement

Thomas Griffin, Chairman

Use of funds, derived from bond issue, for certain preconstruction costs of municipal and quasi-municipal pollution abatement construction programs.

SYLLABUS:

Detailed planning and engineering costs, which are incurred after a municipality or quasi-municipal corporation has made the decision to construct a pollution abatement facility, and which are an essential prerequisite to actual construction (as opposed to costs of pilot plans, feasibility studies, cost estimates and the like) are part of the "construction program" for which the Water and Air Environmental Improvement Commission may, acting under and within the limitations of 38 M.R.S.A. §411 (Supp. 1968), properly make grants, to the appropriate entity, from funds provided by the bond issue authorized by Me. Priv. & Spec. Laws 1963, ch. 235.

FACTS:

Me. Priv. & Spec. Laws, ch. 235 (the "Act") authorized a $25 million bond issue "for the purpose of raising funds to provide for the *construction and equipment* of pollution abatement facilities . . . " (Act, § 1; emphasis supplied).

38 M.R.S.A. § 411(1) (Supp. 1968) authorizes the Water and Air Environmental Improvement Commission (the "WAEIC") to partially subsidize the expense of a "municipal or quasi-municipal pollution abatement *construction* program which has received federal approval and federal funds for *construction* . . . " (emphasis supplied).

Both the Act and § 411 are closely linked to the Federal Water Pollution Control Act, 33 U.S.C.A. §§ 466-466k, which provides for federal grants to states in aid of

pollution abatement efforts. The relevant portion of the federal statute, for our purposes, reads:

> "The Secretary is authorized to make grants to any state . . . for the *construction* of necessary treatment works . . . and for the purposes of *reports, plans and specifications* in connection therewith." 33 U.S.C.A. § 466e(a) (emphasis supplied).

QUESTION:

May the WAEIC make grants, from funds provided by the Act, to municipalities and quasi-municipal corporations, for detailed preconstruction planning and engineering costs, which form an essential prerequisite to actual construction under a federally approved and funded pollution abatement construction program?

ANSWER:

Yes.

OPINION:

The Act and § 411 must be read together and in conjunction with the federal statute. Detailed planning and engineering costs, which are incurred after a municipality or a quasi-municipal corporation has made the decision to construct a pollution abatement facility, and which form an essential prerequisite of the construction program (as opposed to the cost of pilot plans, feasibility studies, cost estimates and the like) are a part of the "construction program" contemplated by all three statutes, and accordingly are subsidizable under and to the extent permitted by the Act and § 411.

We direct attention to the following limiting language in § 411:

> "State grant-in-aid participation shall be limited to grants for waste treatment facilities, interceptor systems and outfalls . . .
>
> "The word 'expense' shall not include costs relating to land acquisition and debt service."

ROBERT G. FULLER, JR.
Assistant Attorney General

CROSS REFERENCE

Grants for unspecified "planning" not authorized, see opinion dated October 3, 1968.

December 13, 1968
Motor Vehicle Division
Secretary of State

Charles E. Wyman, Assistant Director

Registration of Certain Motor Vehicles.

SYLLABUS:

A New Hampshire corporation, which registers vehicles only in that State, but garages

and operates them in Maine, is, if it owns such vehicles, in violation of Maine's vehicle registration law unless it qualifies for exemption under 29 M.R.S.A. 4 or § 2243 (1964).

FACTS:

A New Hampshire corporation, which has qualified to do business in Maine, has registered several vehicles in New Hampshire. It is not known whether the corporation is the owner of these vehicles. The vehicles are garaged in Maine, and are operated upon the roads of this State by the New Hampshire corporation. The vehicles are not registered in Maine.

QUESTION:

Upon the given facts, is the corporation in violation of Maine's vehicle registration statute?

ANSWER:

The corporation is in violation of the statute only if:

1. The corporation owns the vehicles in question; and
2. In the event that the arrangement contemplated by 29 M.R.S.A. § 4 (1964) has been made, the vehicles are operated in other than intrastate commerce or beyond 10 miles from the border; or
3. If New Hampshire does not grant to Maine vehicle owners the exemptions from registration set forth in 29 M.R.S.A. § 2243 (1964).

OPINION:

The basic requirements of Maine law respecting the registration of motor vehicles appear in 29 M.R.S.A. § 102 (1964).

> "Except as section 2243 provides for reciprocity with other states, any resident of this State, and any owner, as defined in section 1, shall register any vehicle to be operated or to remain on any way in this state, . . . "

There are two exceptions here pertinent to this basic registration requirement. The first is found at 29 M.R.S.A. § 2243 (1964), which states that the requirement shall not apply to

> " . . . any nonresident owner or operator who shall have complied with the registration . . . laws of the state . . . of residence to the extent that said state . . . grants the same or similar provisions to residents of this State."

The other pertinent exception is found at 29 M.R.S.A. § 4 (1964):

> "Notwithstanding any other law to the contrary, the Secretary of State is empowered to make agreements or arrangements with the duly authorized representatives of the state of New Hampshire providing that trucks, tractors or semi-trailers owned by residents of such bordering state and legally registered in such state may be operated in intrastate commerce in this State within a zone not to exceed 10 miles from the border of such state . . . "

The facts you supplied to us indicate only that the subject corporation has registered the vehicles in question in New Hampshire. Registration is no more than *prima facie* proof of ownership. *Cf.* 61. C.J.S. *Motor Vehicles* §§ 517 (d), 524. Therefore, we

cannot determine whether the subject corporation is an "owner" within the meaning of 29 M.R.S.A. §102 (1964) and so required to register its vehicles in Maine. An "owner" for purposes of Title 29 and as defined for such purposes in 29 M.R.S.A. § 1 (9) (1964) means:

> " . . . (A)ny . . . corporation holding title to a motor vehicle or having exclusive right to the use thereof for a period greater than 30 days or the mortgagor or vendee in a conditional sales contract . . . (;) . . . any . . . corporation . . . owning a motor vehicle or having the right to use the same, under contract, lease or hiring; . . . "

However, even if the subject corporation is an "owner" within the meaning of §102, it may be exempt from the registration requirement of that section if it has complied with the New Hampshire registration laws and New Hampshire grants registration exemption to Maine vehicles in similar circumstances; or, if the arrangement contemplated by 29 M.R.S.A. § 4 has been made and if the vehicles are operated only in intrastate commerce and within 10 miles of the Maine-New Hampshire border, exemption would likewise exist.

That portion of your inquiry as to whether the given facts state a violation of any of this state's taxation laws should be referred to the Bureau of Taxation.

ROBERT G. FULLER, JR.
Assistant Attorney General

January 6, 1969
Pineland Hospital and Training Center

Bruce Libby, Director, Bliss Vocational Rehabilitation Center

Clients of Division of Vocational Rehabilitation Referred to, and Participating in, Bliss Vocational Rehabilitation Unit Program – Status

SYLLABUS:

Clients of the Vocational Rehabilitation Division of the Department of Education, participating in the program at the Bliss Vocational Rehabilitation Unit of the Pineland Hospital and Training Center and residing therein are to be treated as patients of the Pineland Hospital and Training Center – Statutes relating to admission of, and responsibility for Pineland patients being applicable to such Clients.

Clients of the Division of the Vocational Rehabilitation of the Department of Education participating in the program at the Bliss Vocational Rehabilitation Unit, placed on trial visit under Title 34, M.R.S.A. § 2154, are not properly placed in the custody of a Vocational Rehabilitation Counsellor of said Division of Vocational Rehabilitation – his function being other than that of a responsible person within the contemplation of the Statute.

FACTS:

The Pineland Hospital and Training Center through its Bliss Vocational Rehabilitation Unit and the Division of Vocational Rehabilitation of the Department of Education have in process a cooperative venture in the operation of this Unit. Persons admitted to the Pineland Hospital and Training Center as part of their program may

utilize the services of the Bliss Unit. Also, persons who are clients of the Division of Vocational Rehabilitation of the Department of Education may be referred to the Bliss Unit to then reside at such facility and participate in its program. Services available in other parts of the Pineland Hospital and Training Center, e.g., physical therapy, speech therapy, psychotherapy, may be required by such referred clients and may be provided to such person in conjunction with the program offered within the Bliss Rehabilitation Unit. Clients of the Vocational Rehabilitation Division of the Department of Education referred to the Bliss Rehabilitation Unit may, following completion of a program within that Unit be placed in the community in the custody of a responsible person, there to pursue an independent or partially independent life. Initially, often such placement may be by way of a trial, the person – remaining subject to the Bliss Rehabilitation Program.

QUESTIONS:

1. Is a client of a Vocational Rehabilitation Division of the Department of Education, residing at the Bliss Vocational Rehabilitation Unit and participating in its program to be considered a patient of the Pineland Hospital and Training Center and thus, subject to laws pertaining to that institution and admission thereto?
2. May a Vocational Rehabilitation Counsellor of the Division of Vocational Rehabilitation of the Department of Education be considered a responsible person under Title 34, M.R.S.A. §2154?

ANSWERS:

1. Yes.
2. No.

REASON NO. 1:

An analysis of the laws relating to the Pineland Hospital and Training Center, including provisions relative to admission procedures and the laws relating to the Division of Vocational Rehabilitation of the Department of Education brings us to the conclusion that clients, so-called, of the Division of Vocational Rehabilitation of the Department of Education participating in the Bliss Rehabilitation Program as described in the facts, in order to so participate in such program must be admitted to the Pineland Hospital and Training Center in accordance with applicable admission procedures, as in the case of any other patient admitted to that facility.

The Bliss Vocational Rehabilitation Unit is not an autonomous entity functioning apart from the Pineland Hospital and Training Center, but is an integral part of the total Pineland program, exists on the property of that institution and is under the supervision and control of the Superintendent of Pineland. It is our further opinion that the services of the Pineland Hospital and Training Center respecting resident patients are available to such patients only if they are admitted to Pineland in accordance with law. We find no laws relating to the Division of Vocational Rehabilitation of the Department of Education, which in any way alter the applicability of statutes pertinent to the Pineland Hospital and Training Center, in such cases.

Under statutes applicable to the Division of Vocational Rehabilitation of the Department of Education, that Division may work cooperatively with other agencies in the establishment of Vocational Rehabilitation Facilities, and may participate in the operation of such facilities. (See: Title 20, M.R.S.A. §3059.)

This permissive legislation, however, can not be said to alter statutory provisions applicable to admission to, and the operation of, a facility with respect to which the Division of Vocational Rehabilitation is functioning cooperatively.

We find basis for our opinion in the following language of Title 34, M.R.S.A. § 2151, relating to the Superintendent of the Pineland Hospital and Training Center:

> " . . . . . He shall be responsible for the training, education, treatment and care of all persons received into the Pineland Hospital and Training Center. He shall be responsible for the release of all such persons, except those placed in the Pineland Hospital and Training Center under Title 15, § § 101 or 103. He shall have direct supervision, management and control of the grounds, buildings and property and officers and employees of the Pineland Hospital and Training Center, subject to the approval of the Department."

REASON NO. 2:

Title 34, M.R.S.A. 1964, § 2154 reads as follows:

> "The Superintendent of the Pineland Hospital and Training Center may at his discretion, except in instances of placement in the Pineland Hospital and Training Center under Title 15, § § 101, 103, release any patient for a definite or indefinite length of time to any responsible person under such conditions as the superintendent may specify, which release may at any time be revoked or extended. No such patient shall be allowed to leave the institution temporarily until an agreement has been procured by the superintendent from some responsible person or persons to provide such patient with proper care during his period of temporary absence from the institution. In the event that any such patient should fail to return to the institution at any time required by the superintendent, full power to retake and return such patient is expressly conferred upon the superintendent, whose written order shall be a sufficient warrant authorizing any officer named therein to return such patient to the institution."

It is the opinion of this office that the Vocational Rehabilitation Counsellor, employed by the Division of Vocational Rehabilitation of the Department of Education, is not in that class of persons contemplated by the Legislature to assume responsibility under the above quoted section.

COURTLAND D. PERRY
Assistant Attorney General

January 8, 1969
Labor and Industry

Madge E. Ames, Director Min. Wages

Maine Institution for the Blind – Minimum Wage Coverage

SYLLABUS:

When a nonprofit organization is not receiving a major portion of its income from public sources, it is not a public-supported nonprofit organization and is subject to the minimum wage law.

FACTS:

Financial information concerning the Maine Institution for the Blind indicates that it does not receive a major portion of its current annual receipts from public sources. In fiscal year 1968, for example, of total receipts of $44, 437.16, the only receipts from current public sources were: $356.07 from donations and miscellaneous receipts, and $3,041.50 appropriated by the State Legislature. In more than twenty-five years no fund-raising effort has been made by the institution other than the mailing of letters to lawyers and clergymen concerning the inclusion of the institution in the wills of clients and parishioners.

QUESTION:

Must the Maine Institution for the Blind pay minimum wages to its employees under the provisions of 26 M.R.S.A. §661, et seq?

ANSWER:

Yes.

REASON:

26 M.R.S.A. § 663, subsection 3, E, exempts a public-supported nonprofit organization from payment of minimum wages to its employees. To entitle an organization to such exemption it must show that the major portion of its current annual receipts is derived from public sources. This, the Maine Institution for the Blind has not shown. It is, therefore, not a public-supported nonprofit organization entitled to the above exemption.

LEON V. WALKER, JR.
Assistant Attorney General

January 9, 1969
Sales Tax Division

To: John Singer, Director

Subject: Sales Tax Assessments Upon a Suspended Maine Corporation

SYLLABUS:

A corporate taxpayer must be assessed, for sales and use tax purposes, as a corporation even though the sales and use tax liability accrued after its corporate charter was suspended pursuant to 36 M.R.S.A. § 2406.

FACTS:

The taxpayer has been registered as a corporate seller with the Sales Tax Division since March 2, 1966. It has filed Federal Income Tax returns as a corporation for the fiscal years ending June 30, 1967 and June 30, 1968. The personal property tax for 1968 on stock in trade was assessed against an individual who is the major stockholder,

not against the corporation.

The corporation was formed and its certificate filed with the Secretary of State on December 31, 1963. The Secretary of State suspended its charter on December 2, 1965 for having failed to pay its annual franchise tax. According to the records of the Secretary of State this corporation's certificate remains suspended.

QUESTION:

Should the taxpayer, for purposes of formal sales and use tax assessments, be assessed as a corporation even though the Secretary of State has suspended the corporate charter pursuant to 36 M.R.S.A. § 2406?

ANSWER:

The taxpayer should be assessed as a corporation.

REASONS:

Pursuant to 36 M.R.S.A. § 2405 the charter of a Maine corporation may be forfeited by a judicial proceeding instituted in the Superior Court by the Attorney General. The Secretary of State is an administrative officer who, pursuant to 36 M.R.S.A. § 2406, is empowered to suspend a corporate charter for nonpayment of franchise tax fees. He has no power to forfeit the charter. The North Dakota Supreme Court in *Farmer's State Bank v. Brown* 204 N. W. 273 (1925), stated at page 677:

> "An examination of the statutes of this State and of the authorities with reference to the requirement of an annual license or filing fee, and the effect of nonpayment of the same, convinces us that under these statutes the general rule is applicable, and, where the State has not forfeited the charter for nonuser or breach of condition, through action brought in the courts, the corporate existence of a defaulting corporation cannot be collaterally questioned."

The statutes referred to by the North Dakota court are similar to those of Maine.

The Wisconsin Supreme Court in *West Park Realty Co. v. Porth* 212 N. W. 651, also faced a factual and statutory situation similar to the one presently before us. The Court stated at page 653:

> "The Secretary of State is a mere ministerial officer . . . It therefore becomes apparent that, when the Legislature authorized the secretary of state to declare a forfeiture, it merely intended that such declaration should operate as a cause for forfeiture, which could be enforced in a proper action brought by the Attorney General or by any private party in the name of the State, under the provision of 286.36 of the Statute."

The nonpayment of corporate franchise taxes does not affect the creation and existence of a corporation. However, failure to pay these franchise taxes can be a ground for forfeiture proceedings by the Attorney General under 36 M.R.S.A. § 2405.

> "Under other statutes, however, the corporation comes into existence as soon as proper articles of association or a proper certificate of incorporation or charter is filed in the office or offices designated in the statute . . . and the organization is completed afterward, the statutory provisions as to organization, or as to filing a certificate of organization, being conditions subsequent, a failure to comply with which does not affect the corporate existence unless it is directly attacked in a proceeding by the state." 18 C.J.S. Corporations § 63, page 448.

Finally, because a charter suspended under § 2406 may be revived by payment of all franchise taxes and expenses of advertising, and because a corporation continues to be liable for annual franchise taxes even though its charter has been suspended, it follows that the corporation continues to be liable for the reference assessment. The Court in *West Park Realty Co. v. Porth,* supra, at page 652 stated:

> "Subdivision 7 of § 180.08 authorizes the secretary of state to rescind the forfeiture on the payment of a penalty of $25 and the filing of the affidavit required by said section. This in itself indicates that it was the legislative intent, not that the corporation had forfeited its franchises and charter, but that it might still be recognized as a valid operating legal entity upon compliance with certain conditions."

WENDELL R. DAVIDSON
Assistant Attorney General

January 10, 1969
Soil and Water

Charles L. Boothby, Executive Secretary

Delegation of vote by Supervisors of Soil and Water Conservation District to private persons.

SYLLABUS:

A Supervisor of a Soil and Water Conservation District cannot delegate his authority to vote.

FACTS:

In your memorandum under date of December 18, 1968 submitted to this Office it is stated that several Soil and Water Conservation Districts have asked individuals to sit in on the deliberations of the Boards of Supervisors. These are usually individuals with special interests in some phase of the soil and water conservation program. Occasionally, to complete a quorum for a meeting, these individuals are allowed to vote on official District business.

QUESTION:

Can elected or appointed public officials such as Supervisors of Soil and Water Conservation Districts delegate their official voting powers to private individuals on a temporary basis?

ANSWER:

No.

REASONING:

It is a basic rule of the law of agency that an officer, particularly a public officer, may delegate the performance of ministerial duties to others but that said officials may

not delegate the performance of acts of discretion.

"An officer, to whom a power of discretion is entrusted, cannot delegate the exercise thereof except as prescribed by statute. He may, however, delegate the performance of a ministerial act, as where, after the exercise of discretion, he delegates to another the performance of a ministerial act to evidence the result of his own act of discretion." 67 C.J.S. (Officers) § 104, pp. 373-374.

12 M.R.S.A. § 152 (as amended by P. L. 1965, c. 190, § 11, 12) provides that "the supervisors may delegate to one or more supervisors, or to any agents or employees, such powers and duties as they may deem proper". This is indeed a broad delegation of authority vested in supervisors, but said statutory language cannot be interpreted to embody the authority to delegate the right to vote to private citizens.

Duly elected or appointed "supervisors" as defined in 12 M.R.S.A. § 3 (5) are solely empowered to act as the governing body of "districts" and do not possess the authority to delegate such governing power to private individuals.

PHILLIP M. KILMISTER
Assistant Attorney General

January 13, 1969
Mental Health and Corrections

William E. Schumacher, M.D., Acting Commissioner

Status of State Employees Walking Off Job

SYLLABUS:

The State of Maine has no collective bargaining or any other type of Labor Relations Contract with any Labor Union. Any State employees, members of a Union, walking off their jobs may be regarded as individuals who have absented themselves from their work without leave under Personnel Rule 11.4, and disciplinary action may be taken against them.

FACTS:

The Personnel Department of one of the institutions under the control of the Department of Mental Health and Corrections in anticipation of the possibility that employees of that institution, members of a Labor Union, may strike that institution, has requested the Opinion of this office relative to the authority of an institution to deal with such move on the part of the Union Members.

QUESTION:

Has a State institution authority to regard employees, members of a Labor Union, who walk off their jobs, as employees who have absented themselves from work without leave?

ANSWER:

Yes.

REASON:

The State of Maine has no collective bargaining agreement or any other type of Labor Relations Contract with any Labor Union, with respect to any State employees.

It is, therefore, our Opinion that if employees of a State institution who are members of a Labor Union walk off their jobs in concert or otherwise, such employees act within the contemplation of the Personnel Law and Rules as individuals, and may be regarded by the institution as employees who have absented themselves from their jobs without leave. For authority we cite the provisions of Personnel Rule 11.4, which reads as follows:

> "Any absence of an employee from duty that is not authorized by a specific grant of leave of absence under the provisions of these rules or taken as earned vacation leave about to expire, shall be deemed to be on absence without leave. Any such absence shall be without pay and may be made grounds for disciplinary action. In the absence of such disciplinary action any employee who absents himself for three consecutive days without leave shall be deemed to have resigned, but such absence may be covered by a subsequent grant of leave without pay in accordance with Rule 11.14."

Under this Rule, disciplinary action may be taken against such employees for walking off their jobs.

Under Title 5, § 678, repealed and replaced by P.L. 1968, c. 539, § 2:

> "An appointing authority may dismiss, suspend or otherwise discipline an employee for cause. This right is subject to the right of appeal and arbitration of grievances set forth in sections 751 to 753."

Absence without leave, in our view, would constitute "cause" under the Statute.

In the absence of disciplinary action against any such employee, and in the event that such employee shall continue in absence from work by way of walk-off for a period of three days he may be regarded as having resigned from his employment.

COURTLAND D. PERRY
Assistant Attorney General

January 15,1969
Water and Air Environmental
Improvement Commission

R. W. Macdonald, Chief Engineer

38 M.R.S.A. § 413 and changes of ownership

SYLLABUS:

The legislative license granted by the last sentence of 38 M.R.S.A. § 413 (1964) accrues only to the owners of the manufacturing, processing and industrial plants and establishments discharging prior to August 8, 1953, and does not pass to successive owners of the facilities from whence the discharge emanates, either as a matter of law or by a purported assignment.

FACTS:

Prior to August 8, 1953 Corporation A operated a manufacturing plant which

discharged effluent into a body of water. The legislative license granted in 38 M.R.S.A. § 413 permitted such discharge. After August 8, 1953 Corporation A sells the plant to Corporation B, which continues to operate the plant and to discharge effluent without applying for a waste discharge license.

QUESTION:

Must Corporation B apply to the Commission for a waste discharge license?

ANSWER:

Yes.

OPINION:

38 M.R.S.A. § 413 (1964) provides:

> "No . . . corporation . . . shall discharge into any stream, river, pond, lake or other body of water or watercourse or any tidal waters, whether classified or unclassified, any waste, refuse or effluent from any manufacturing, processing or industrial plant or establishment or any sewage so as to constitute a new source of pollution to said waters without first obtaining a license therefor from the commission. No license from the commission shall be required under this section or section 414 for any manufacturing, processing, or industrial plant or establishment, operated prior to August 8, 1953, for any such discharge at its present general location, *such license* being hereby granted." (Emphasis supplied.)

We interpret the last sentence of this section as a legislative grant, to the owners of manufacturing, processing or industrial plant or establishments, operated prior to August 8, 1953, of a license to continue discharging effluent of the same general composition and volume, into the waterways of this State, as was discharged by them on that date.

We reject the argument that the language in the last sentence of § 413 – ". . . manufacturing, processing, industrial *plants* or *establishments* . . . " – means that the *building* wherefrom the effluent is discharged is licensed, and that as long as such building is in existence, the effluent from it, as long as it does not vary in composition or volume so as to constitute a new source of pollution to the receiving body of water, may never be the subject of review by the Commission at a license hearing. A license granted to a building is a nullity – the license must be granted to the owner thereof. An order issued by the Commission under the provisions of 38 M.R.S.A. § 451 (Supp. 1968) to a building for violation of license would likewise be a nullity. *Water Improvement Comm. v. Morrill,* 231 A.2d 437, 440 (Me. 1967).

Neither is it the *discharge* which is granted license by § 413. That section only exempts the owner on August 8, 1953 of the facilities, from whence the discharge emanates, from the necessity of obtaining a license for that particular volume and type of discharge. Any change in the volume or nature of such discharge, so as to constitute a new source of pollution to the receiving body of water, must be licensed by the Commission to be lawful. See opinion of this office dated December 29, 1967.

The privileges of the license granted by the legislature under § 413, then, extend to the *owners* of those manufacturing, processing and industrial plants and establishments, operated prior to August 8, 1953. We note that the legislature refers to the privileges granted by § 413 as a "license", not only in § 413 itself, but also in § 416 and § 451 as well of Title 38.

It seems clear that the legislature did not create an equitable servitude appurtenant to the land from whence the effluent emanated, which might pass with the transfer of such land, but rather conferred a uniquely personal and limited privilege upon a specified, limited and existing class to continue using the public waters of the State for the disposal of waste – a privilege which, it cannot be argued, exists of right.

Given this view of the statute, it follows that such privilege cannot continue from owner-of-effluent-source to successive owner. It is inapt to attempt an analogy to the "non-conforming use" in zoning law, a use which, although outlawed by ordinance, may nonetheless continue in existence after the effective date of the ordinance under successive owners as long as such use is not abandoned. It is the *use*, in the zoning situation, which is protected and allowed to continue. See *Toulouse v. Bd. of Zoning Adjustment,* 147 Me. 387, 87 A.2d 67 (1952); see generally 2 Metzenbaum, *Law of Zoning* 1210, 2 Yokley, *Zoning Law and Practice* §16-2. Such use, further, has been held to run with the land and to be entitled to constitutional protection. See Yokley, *op. cit.,* §16-3 and cases there cited.

In the situation at hand, it is not the *use* (*i.e.,* the discharge– which is protected. Rather, it is the *users* – who have been granted license [perhaps "franchise" would be a more appropriate term – see *Madden v. Queens Jockey Club,* 296 N.Y. 249, 255, 72 N.E.2d 697, 699 (1947)] to continue the use, which they do not possess of right, so long as they do not materially increase or change it. This license being granted to a specified, limited and existing class, there being no provision in the statute providing for transferability, either as a matter of law or by a purported assignment, and there being no compelling reason of public policy apparent to imply such transferability, we conclude that transfer was not intended to be capable of accomplishment. See Restatement, *Property* §517, American Law of Property §8.122.

ROBERT G. FULLER, JR.
Assistant Attorney General

January 16, 1969
Education

Kermit S. Nickerson, Deputy Commissioner

School Construction Aid; Subsidy on Interest Accrued re Temporary Borrowing Prior to Sale of Bonds by Administrative Unit.

SYLLABUS:

Interest paid by a school administrative district on temporary borrowing, done in anticipation of receiving state aid for school construction, is eligible for school construction aid under 20 M.R.S.A. § 3457.

FACTS:

The voters of a particular school administrative district authorized its Board of Directors to issue bonds totaling $2,000,000 for the purpose of constructing a high school. The vote occurred between May 11, 1966 and April 27, 1967, at a time when the statutes provided for a lump sum payment of the State's share of such capital outlay expenditures. Too, at the time the voters of the district authorized the directors to issue bonds, the State's percentage of school construction aid for this particular district was

set at 46%. Prior to the issuance of bonds by the district, the directors borrowed funds to meet construction expenditures as they became due; and this was done by the district in anticipation of receiving state aid. Had the lump sum payment plan remained in the statutes, the district would have issued bonds totaling $1,080,000 representing 54% of the $2,000,000 total cost figure of the school; and the State would have paid the district $920,000 representing 46% of the cost of the project.

QUESTION:

Whether or not the interest paid on the district's temporary borrowing prior to its sale of bonds is reimbursable as a capital outlay expenditure?

ANSWER:

Yes.

REASON:

According to the provisions of 20 M.R.S.A. § 3457, school administrative districts are to report capital outlay expenditures to the Commissioner of Education, which expenditures shall include " * * * the amount of interest to be paid each year and the rate of interest * * * ." On the basis of all the reports on file in the office of the Commissioner of Education, state aid for school construction is paid to eligible administrative units, " * * * including principal and interest payments * * * ." The language of the Maine Statutes relating to public education intends that the amount of interest paid on temporary borrowing by a school administrative district be reimbursable as are other capital outlay expenditures.

It is true that the subject school administrative district was obligated to fund 54% of the cost of the project ($1,080,000) and that the State, according to the appropriate Maine Statutes relating to state aid for school construction, was responsible for funding the remaining 46% of the project ($920,000). However, capital outlay expenditures are defined in the statutes relating to public education, and we find no basis in the law for a determination that capital outlay expenditures may be the district's "share" at one time, and the State's "share" at another time.

In the event that state aid is paid to this particular district recognizing that the district has incurred interest due to temporary borrowing, then this extent of payment of state aid re interest will be no different from the manner in which state aid has been paid for interest on borrowing for school construction in the past; as well as for interest on borrowing for present school construction.

JOHN W. BENOIT, JR.
Assistant Attorney General

January 16, 1969

Honorable Louis Jalbert
House of Representatives
State House
Augusta, Maine

Re: Transferability of Longevity and Sick Leave Credits

Dear Representative Jalbert:

The following opinion is written in response to your inquiry.

SYLLABUS:

When a former unclassified employee is employed as a classified employee after a break in State service, there is a basis in law for denying the transfer of sick leave credits. The first longevity step will be earned after 5 years of continuous service in the classified position provided there is 8 years combined employment in unclassified and classified positions.

FACTS:

The following fact situation was presented to this office for a ruling:

An employee of Gorham State College was granted a leave of absence, without pay. During the leave period, the employee's position was abolished, thus placing employee on layoff status.

Same employee subsequently employed at Baxter School for the Deaf and was denied longevity and sick leave credits of approximately 18 years of State service. In fact, the employee became a NEW State employee in the classified service according to Personnel Law and Rules as interpreted.

On the basis of the foregoing facts, the question was posed, "Is there basis in law for denying the transfer of longevity and sick leave credits from unclassified State service into classified State service?" Also an inquiry was made as to the transfer of vacation credits.

Subsequent to the given facts, these additional facts have been ascertained:

1. At the time the employee requested a leave of absence effective December 26, 1964, the Gorham State Teacher's College (now Gorham State College) agreed to grant the leave of absence.

2. On January 8, 1965, the Education Department by written memorandum informed the Administrative Assistant of Gorham State Teacher's College (now Gorham State College) that a leave of absence may not be given for the convenience of an employee and it was necessary to terminate the employee's services.

3. Within a very short time thereafter, the Administrative Assistant orally informed the former employee, who at the time he was so informed was an acting postmaster for the Town of Gorham, that a leave of absence was no longer possible and that his services were effectively terminated.

4. Payment was made for the accumulated vacation time administratively granted.

5. On September 28, 1967 the former employee began work at a classified position for the Baxter School for the Deaf.

QUESTION:

Is there a basis in law for denying the transfer of longevity and sick leave credits?

ANSWER:

See Opinion.

OPINION:

Employees of Gorham State College are in the unclassified service, 5 M.R.S.A. § 711, subsection 8, as amended. A member of the unclassified service does not carry benefits under the Personnel Rules. However, longevity increases were afforded to both classified and unclassified employees pursuant to Chapter 202 of the Private and Special Laws of 1963. The longevity required for a first longevity increase is a total of 8 years' employment with the last five years continuous service, and for the second longevity increase a total of 15 years' service with the last 10 years continuous.

Under the present fact situation there was a break in State service. A classified employee when there is a break in service would not, upon re-entering the classified service, be entitled to his longevity steps he had earned under a longevity policy approved by the State Personnel Board on October 17, 1963. The ninth paragraph of this policy states:

> "Any employee receiving longevity steps will lose such eligibility upon a break in service. The reemployment rate cannot exceed the maximum regular step for the class of employment."

However, after 5 years he would be entitled to his first longevity step.

Section 3 of Chapter 202 of Private and Special Laws of 1963 (the act giving longevity to State employees) requests the authorities responsible for establishing wage rates of unclassified employees not subject to determination by the Governor and Executive Council, to consider similar and equitable treatment as they conclude is appropriate. Therefore, if similar treatment were given to the unclassified employee, he would not be eligible to retain the longevity he had previously earned. However, after 5 years he would be entitled to his first longevity step, just as would a classified employee.

In respect to sick leave credits, the Personnel Rule, Section 11.8, fourth paragraph, provides:

> "A former state employee who is reappointed within four years of his separation from the service under the provisions of the personnel law and these rules, with probationary or permanent status, may have his previously accumulated and unused balance of sick leave revived and placed to his credit upon approval of the new appointing authority."

Pursuant to this paragraph a classified employee can only obtain credit for accumulated and unused sick leave with the approval of the new appointing authority. Therefore, there is a basis in law for denying the transfer of sick leave credits.

Respectfully,

JEROME S. MATUS
Assistant Attorney General

January 17, 1969
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Treatment of Joint bank accounts for inheritance tax purposes.

SYLLABUS:

SURVIVORSHIP IS NOT PERMITTED OF JOINT BANK ACCOUNTS IN THE NAME OF MORE THAN TWO PARTIES EXCEPT THOSE SPECIFICALLY PERMITTED BY 9 M.R.S.A. § 515(2).

FACTS:

Several questions have arisen in the determination of inheritance tax liability in the treatment of joint bank accounts in three or more names.

The statutory provision involved reads as follows:

> "All such accounts, whenever opened, or such shares and accounts in loan and building associations whenever issued, payable to either or the survivor, who are husband and wife, up to, but not exceeding an aggregate value of $10,000, and payable to either of 2 or more or the survivor of those persons who are parent and child, grandparent and grandchild, or brothers and sisters, up to, but not exceeding an aggregate value of $5,000 including interest and dividends, in the name of the same persons in all banks, savings banks, loan and building associations or trust companies within this State shall, in the absence of fraud or undue influence, upon the death of any such persons, become the sole and absolute property of the survivor or survivors, even though the intention of all or any one of the parties be in whole, or in part, testamentary and through a technical joint tenancy be not in law or fact created. The said amount which so becomes the sole and absolute property of the survivor or survivors pursuant to this subsection shall be exclusive of, and in addition to, any amounts to which such survivor or survivors are entitled under common law as contributors to such account or accounts, share or shares." 9 M.R.S.A. § 515(2) as amended by P.L. 1967, C. 386.

QUESTIONS:

1. Are the following bank accounts covered by the statute?
   a. Husband, wife and child.
   b. Husband, wife and grandchild.
   c. Husband, wife and grandparent of either.
   d. Husband, wife and brother or sister of either.
   e. Brother, sister and child of either.
   f. Brother, sister and grandchild of either.
   g. Brother, sister and grandparent
   h. Husband, brother of wife and child or grandchild of either.
2. To what are the survivors entitled if the account falls within the scope of the statute?

ANSWERS:

1. a. Yes, as an account payable to those persons who are parent and child.
   b. Yes, as an account payable to those persons who are grandparent and grandchild.
   c. No.
   d. No.
   e. No.
   f. No.
   g. Yes, as an account payable to those persons who are grandparent and grandchild.
   h. No.

2. Accounts among parents and children, brothers and sisters, grandparents and grandchildren are subject to the $5,000 limitation. Three party accounts of any other relationship are not entitled to survivorship amounts under the statute.

REASONS:

At common law, the creation of a joint bank account required the existence of a valid inter vivos gift, *Hand v. Nickerson,* 148 Me. 465 (1953), in addition to the presence of the four unities. *In re Garland,* 126 Me. 84 (1927).

The present statute is in derogation of the common law. As such, it must be strictly construed. *Stanton v. Trustees of St. Joseph's College,* 233 A2d 718 (1967)

> **** [T]he common law is not to be changed by doubtful implication, be overturned except by clear and unambiguous language, and . . . a statute in derogation of it will not effect a change thereof beyond that clearly indicated either by express terms or by necessary implication. *Chase v. Inhabitants of Litchfield,* 134 Me. 122, 129 (1936).

Therefore, the statutory changes must be construed carefully so they are not applied beyond those situations clearly covered by the language.

There are certain classes of individuals who are permitted to succeed to funds of joint bank accounts. They are (1) husband and wife, (2) parent and child, (3) grandparent and grandchild, and (4) brothers and sisters.

1. An account in the names of husband and wife and their child or children falls within the scope of the statute, but only by reason of the fact that the husband and wife are parents of the child or children. The language which permits survivorship of accounts between husband and wife can not be construed to allow the inclusion of a child so as to permit the passage of $10,000 to the surviving spouse. The $10,000 limit applies only to a two party account between husband and wife.

To permit the survivorship of a three party account among parents and their children, it is necessary to look to the relationship of parent and child and the language "payable to either of two or more or the survivor of those persons who are parent and child." The survivors are permitted to take pursuant to this exception to the common law principle, since the statute clearly abrogated the application of the common law to accounts between parent and child.

The statute does not cover accounts between husband and wife and any of the remaining relationships mentioned unless the husband and wife are also grandparents and the account is with a grandchild. In order for survivorship to be permitted under the statute, the accounts must be in the name of (1) grandparents and grandchildren, or (2) brothers and sisters.

An account in the names of a brother and sister with a child or grandchild of either is not covered by the statute. An account with grandparent and grandchildren (the grandchildren being brother and sister) is covered as an account between grandparent and grandchild. A brother-in-law is not included within the coverage of the statute.

2. Except for two party accounts between husband and wife where the limit of survivorship is $10,000, all other accounts covered by the statute are limited to $5,000. If there are more than two parties, such as, grandparents and several grandchildren, several brothers and sisters, the aggregate amount allowed to pass is still only $5,000 "in the name of the same persons in all banks."

JAMES M. COHEN
Assistant Attorney General

January 29, 1969
Liquor Commission

Keith H. Ingraham, Chairman

Sale of tax free liquors by licensee

SYLLABUS:

A licensee who sells malt liquor is not precluded by the terms of 28 M.R.S.A. § 1(16) from selling tax free liquors on premises owned or leased by a corporation duly qualified to engage in the sale of said liquor.

FACTS:

A malt liquor licensee is in the employ of the Ammex Corporation, which sells tax free liquors pursuant to the terms of the U.S. Tariff Act 19 U.S.C.A. § (1-1991). The sale of liquor is consummated at a retail outlet proximate to the licensee's duly licensed premises on which malt beverages are sold at retail to the public. The licensee admits the sale of liquor for the Ammex Corporation, and refuses to display to enforcement officials of the Maine State Liquor Commission books and records relative to the sales of said liquor. The licensee seeks a renewal of his license to sell malt liquor.

ISSUE:

Is a malt liquor licensee precluded from selling tax free liquors on premises which are contiguous to his licensed malt liquor retail business ?

ANSWER:

No.

REASONING:

A licensee who sells malt liquor is not precluded from selling tax free liquors on premises owned or leased by a corporation duly qualified to engage in the sale of said liquors. The first and third paragraphs of 28 M.R.S.A. § 1(16) read as follows:

> "Premise or premises. 'Premise' or 'premises' shall mean and include all parts of the contiguous real estate occupied by a licensee over which the licensee has direct or indirect control or interest *and which the licensee uses in the operation of the licensed business and which have been approved by the commission as proper places therein for the exercise of the license privilege."* (emphasis supplied)
>
> "The commission shall establish rules and regulations for the separation of areas where the license privilege may be exercised from areas where it may not be exercised, but complete non-access between the areas controlled by the licensee need not be required."

The selling of tax free liquor on behalf of Ammex Corporation by the licensee above-described is in no manner a use of contiguous premises in the operation or furtherance of the licensee's business, to wit: sale of malt beverages.

The Liquor Commission has no authority to license or regulate in any manner the sale of tax free intoxicating liquors and the records and books relative to said sales are not a proper subject for investigation by enforcement officials of the Commission. The manner

in which a person or corporation conducts the sale of tax free liquor, cigarettes, or any other duty free commodity is a matter for regulation by Customs Officials.

PHILLIP M. KILMISTER
Assistant Attorney General

March 4, 1969
State Board of Registration
of Land Surveyors

Richard A. Coleman, Chairman

Non Citizens as Land Surveyors

SYLLABUS:

Persons who are not citizens of the United States may be registered as Land Surveyors in Maine.

FACTS:

A person who is not a citizen of the United States seeks to register as a Land Surveyor in Maine under the provisions of 32 M.R.S.A. §1661 et seq.

QUESTION:

Does an applicant have to be a citizen of the United States to qualify for registration as a Land Surveyor in the State of Maine?

ANSWER:

No.

REASONS:

Section 1681 of Title 32 states in part that the minimum satisfactory evidence to the board of qualification for registration is the:

> ". . . holding a certificate of registration to engage in the practice of land surveying issued to him on the basis of a written examination by the proper authority of a state, territory, possession of the United States, the District of Columbia *or of any foreign country,* based on requirements and qualifications, as shown by his application which, in the opinion of the board, are equal to or higher than the requirements of this chapter, may be registered at the discretion of the board." (Emphasis supplied).

The board is to give primary concern in complying with the above quoted section to the written examination of the geographical and political areas described. Foreign country examinations are specifically included. Persons taking such a written examination in a foreign country could well be non-citizens of the United States. Inasmuch as the quoted section bases that particular minimum on the examination taken and there being no provision elsewhere in the statute specifically precluding non-citizens of the United States from registering in Maine, the board may in its discretion register such persons as it determines are qualified.

GARTH K. CHANDLER
Assistant Attorney General

March 13, 1969
Water and Air Environmental
Improvement Commission

Professor Donaldson Koons, Chairman

Reclassification hearings

SYLLABUS:

38 M.R.S.A. § 365 (1964) evinces legislative intent that the Water and Air Environmental Improvement Commission hold a public hearing in the area affected by a proposed reclassification of waters prior to recommending such reclassification to the Legislature.

The Legislature being the final authority on reclassifications, it follows that it may enact legislation reclassifying waters without regard to whether the WAEIC has held the public hearing contemplated by 38 M.R.S.A. § 365 (1964) in connection therewith.

FACTS:

The Water and Air Environmental Improvement Commission proposes to submit, to the current session of the Legislature, bills to reclassify certain waters in the State. No public hearings have been held in connection with these proposed reclassifications.

QUESTIONS:

1. Should the Water and Air Environmental Improvement Commission recommend reclassification of waters to the Legislature without first holding the public hearing contemplated by 38 M.R.S.A. § 365 (1964) in connection with such proposed reclassification?
2. Where no such public hearings have been held by the Water and Air Environmental Improvement Commission with respect to a proposed reclassification of waters, is such reclassification, if enacted into law on the recommendation of the Water and Air Environmental Improvement Commission, nonetheless valid?

ANSWERS:

1. No.
2. Yes.

OPINION:

1. 38 M.R.S.A. § 365 (1964) does not in unequivocal terms state that the Commission must hold a public hearing in the affected area before it may submit a reclassification proposal to the Legislature. Nonetheless, in our opinion, when read as a whole this section evinces a clear legislative intent that such a hearing should be held. Indeed, it would seem that such a hearing is desirable from a policy standpoint (given the vagueness of the statute), since it tends to provide the Commission with information concerning existing and proposed uses and the sense of the community as to what standard the waters under consideration should attain. Such information would appear to be useful to the Commission in making its judgments on reclassification, adds weight

to such judgments, and is, if preserved in a record, useful to the Legislature in determining whether to adopt the Commission's proposal.

2. It should be borne in mind that the Legislature makes the final decisions on reclassifications. 38 M.R.S.A. § 361 (Supp. 1968). The WAEIC by statute, serves the function of advising and recommending to the Legislature with respect to reclassifications. *Ibid.* But it is the Legislature which decides what the classifications shall be, and it is not bound by the Commission's recommendations or advice. A reclassification statute, therefore, is not invalid because the WAEIC did not hold the public hearing.

ROBERT G. FULLER, JR.
Assistant Attorney General

March 18, 1969

To: Thomas S. Squires, Asst. Director, Sales Tax, Bureau of Taxation

Subject: Sale of "Hulls"

SYLLABUS:

A HULL IS NOT A BOAT FOR THE PURPOSES OF 36 M.R.S.A. § 1760 (25); FURTHER, THE SALE OF A HULL TO A NONRESIDENT FOR COMPLETION INTO A BOAT AT A SECOND MAINE BOATYARD IS NOT EXEMPT FROM THE MAINE SALES AND USE TAX LAW.

FACTS:

Taxpayer manufactures and sells marine hulls 35 feet or longer in length, out of a new form of cement. After completion, the hulls are shipped, according to the buyer's directions, to boatyards, either in state or out of state, where superstructures, cabins, wiring, engines, etc., are added.

The hull is the frame or body of a boat exclusive of superstructure, cabin, engine, masts, wiring, rigging, etc. The reference hulls, without these additions, have little practical use.

QUESTIONS:

1. Is a hull to be considered a boat for the purposes of 36 M.R.S.A. § 1760 (25)?
2. If such a hull is sold to a nonresident and is completed into a boat by a second Maine boatyard is the sale exempt from Maine Sales and Use Tax Law?

ANSWERS:

1. A hull is not a boat within the meaning of 36 M.R.S.A. § 1760 (25).
2. The sale of a hull to a nonresident for completion into a boat at a second Maine boatyard is not exempt from the Maine Sales and Use Tax Law.

REASONS:

1. Case law on what constitutes a hull or boat is sparce. Those decisions which do

exist confront the issue of whether or not a hull and/or boat is completed to such a stage that admiralty courts will have jurisdiction or whether state courts will have jurisdiction. Without exception, these cases differentiate between a hull and a completed boat or vessel. These admiralty decisions are useful in defining the term "boat" in 36 M.R.S.A. § 1760 (25) of the Sales and Use Tax Law.

The Oregon Supreme Court in *Northup v. The Pilot,* 6 Ore. 297 (1877) stated at page 299:

> ". . . it must be a boat or vessel used in navigating the waters of the state, and evidently must be such a boat as is complete and capable of being used in the business of carrying freight or passengers, and one which would be subject to commercial regulations.
>
> "The hull of a boat without the other parts necessary to its use is not a boat . . ."

Seven years later the Oregon Supreme Court in *Yarnberg v. Watson,* 4 P. 296, stated at page 297:

> "But a boat in an unfinished state, and wholly unfit for carriage of men or goods on water, or for any purpose for which such a vehicle is intended, is not a vessel."

Finally, the Circuit Court of Appeals, Fifth Circuit, in *R. R. Ricou & Sons Co. v. Fairbanks, Morse & Co.,* 11 F 2d 103 (1926) stated at page 104:

> "We think that the allegations of the libel fairly import that the structure libeled, namely, the boat Nuska, was a water craft, not an uncompleted structure intended to be a boat when it was finished. In common usage the words, "boat" and "vessel" are understood to describe structures so far completed as to be capable of being used as a means of transportation on water."

In view of the above cases, a hull is not to be considered a boat for the purposes of 36 M.R.S.A. § 1760 (25), unless cabins, a superstructure, wiring, engines, etc., have been added and the boat deemed complete.

2. There is no exemption provision which would apply to the sale of a hull to a nonresident for completion into a boat at a second Maine boatyard.

WENDELL R. DAVIDSON
Assistant Attorney General

March 31, 1969

Elden H. Shute, Jr., Deputy
Secretary of State

Registration of certain political committees

SYLLABUS:

A committee organized to raise funds to repay campaign-incurred obligations and to put funds into a political party treasury is a "political committee" within the meaning of 21 M.R.S.A. § 1 (24) (1964) and so required to register with the Secretary of State under § 1393 of that Title.

FACTS:

A committee is organized with the stated purposes of raising funds "to help offset '68

campaign deficits and to assist in assuring a (national political party) victory in Maine in 1970". It appears that any funds raised in excess of those needed to defray campaign deficits will be donated to the state political party committee.

QUESTION:

Is the committee a "political committee" required to register, under 21 M.R.S.A. § 1393 (1964), with the Secretary of State?

ANSWER:

Yes.

OPINION:

A "political committee" is defined in 21 M.R.S.A. § 1 (24) (1964) as:

". . . 2 or more persons associated for the purpose of promoting or defeating a candidate, party or principle."

The proposed purposes of the committee, insofar as they relate to raising money to pay off campaign debts, are not purposes of "promoting or defeating a candidate, party or principle". However the stated purpose of "assuring a (party) victory in Maine in 1970" is clearly such a purpose. Therefore, the fund-raising committee must register.

ROBERT G. FULLER, JR.
Assistant Attorney General

March 24, 1969
Augusta State Hospital

John C. Patterson, M.D., Superintendent

Clarification of Overtime Status Under Federal Fair Labor Standards Act – Amendments 1966

SYLLABUS:

Overtime compensation payable under the Fair Labor Standards Act to covered employees of the Augusta State Hospital is computed on the basis of a 40 hour workweek, i.e., hours worked over 40 hours are compensable at time and one-half. A workweek within the contemplation of the Fair Labor Standards Act is any period consisting of 7 consecutive 24 hour days and need not be computed as a calendar week.

FACTS:

Employees of the Augusta State Hospital have inquired into whether overtime is payable for any hours worked over 8 in any one day, or whether overtime is payable for only hours worked beyond 40 hours in a workweek. The Augusta State Hospital has a fixed workweek running from midnight Saturday to midnight the following Saturday.

QUESTION:

Is overtime payable to covered employees of the Augusta State Hospital under the Fair Labor Standards Act for only those hours worked beyond 40 in any workweek, and is the fixed workweek of the Augusta State Hospital appropriate under the Act?

ANSWER:

Yes, to both parts of the question.

REASON:

The Code of Federal Regulations bearing upon the overtime provisions of the Fair Labor Standards Act provides answers to the issues raised here and are considered by this office to be controlling; the provisions are quoted below:

29 c.f.r."778.102 Application of overtime provisions generally

Since there is no absolute limitation in the Act on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as the required overtime compensation is paid him for hours worked in excess of the maximum workweek prescribed by section 7(a). The Act does not require, however, that an employee be paid overtime compensation for hours in excess of eight per day, or for work on Saturdays, Sundays, holidays or regular days of rest. If no more than the maximum number of hours prescribed in the Act are actually worked in the workweek, overtime compensation pursuant to section 7(a) need not be paid. Nothing in the Act, however, will relieve an employer of any obligation he may have assumed by contract or of any obligation imposed by other Federal or State law to limit overtime hours of work or to pay premium rates for work in excess of a daily standard or for work on Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular workweek or workday....."

29 c.f.r. "778.103 The workweek as the basis for applying section 7(a)

If in any workweek an employee is covered by the Act and is not exempt from its overtime pay requirements, the employer must total all the hours worked by the employee for him in that workweek (even though two or more unrelated job assignments may have been performed) and pay overtime compensation for each hour worked in excess of the maximum hours applicable under section 7(a) of the Act....."

The maximum hours applicable to covered State Hospital Employees under section 7(a) of the Act (29 USC, section 207(a), subsection 2) are 40 hours in a single workweek. This is applicable to the Augusta State Hospital, since it has not elected to go under the special provision of 29 USC, § 207 (j), permitting payment on the basis of 14 days and 80 work hours.

29 c.f.r. "778.104 Each workweek stands alone.

The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked in the 2 weeks is 40. This is true regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly or other basis....."

29 c.f.r. "778. 105 Determining the workweek.

An employee's workweek is a fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under the Fair Labor Standards Act, a single workweek may be established for a plant or other establishment as a whole or different work weeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act....."

COURTLAND D. PERRY
Assistant Attorney General

April 1, 1969
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Ammex Warehouse, Inc. – Property Taxes

SYLLABUS:

BONDED LIQUOR LOCATED IN WAREHOUSES IN MAINE, UNDER U. S. CUSTOMS CONTROL IS NOT SUBJECT TO PROPERTY TAXATION.

FACTS:

Ammex Warehouse, Inc., a non-resident corporation, operates a store in Van Buren for the purpose of selling tax-free liquor for export. It is assumed for the purposes of this opinion that the operation in Van Buren is similar to that in Calais: A customer enters the store, orders and pays for the liquor, receives a receipt, returns to his car, drives twenty-five feet or so and receives merchandise from store clerk who has carried package to the motor vehicle.

The operation of Ammex is subject to the Internal Revenue Code and the Customs Duties Laws of the United States. Some of the applicable statutory provisions will be quoted as follows:

"Distilled spirits on which the Internal Revenue Tax has not been paid or determined as authorized by law may, under such regulations as the Secretary or his delegate may prescribe, be transferred in bond between bonded premises in any approved container. For the purposes of this chapter, the removal of distilled spirits for transfer in bond between bonded premises shall not be construed to be a withdrawal from bonded premises." *26 U.S.C.A. § 5212.*

"All articles manufactured in whole or in part . . . materials subject to Internal-Revenue Tax, and intended for exportation without being charged with duty, and without having an Internal-Revenue Stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses

similar to those known and designated in Treasury Regulations as bonded warehouses, Class 6: *Provided* that the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of law and of such regulations as shall be prescribed by the Secretary of the Treasury.

. . . .

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceeding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

. . . .

A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge, shall be made by the manufacturer containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

. . . .

Distilled spirits and wines which are rectified in bonded manufacturing warehouses, class 6, and distilled spirits which are reduced in proof and bottled in such warehouses, shall be deemed to have been manufactured within the meaning of this section, and may be withdrawn as herein before provided . . . subject to the provisions of this section, and under such regulations as the Secretary of the Treasury may prescribe, there to be withdrawn for consumption or be re-warehoused and subsequently withdrawn for consumption . . . Provided further, that no Internal-Revenue Tax shall be imposed on distilled spirits and wines rectified in class 6 warehouses if such distilled spirits and wines are exported or shipped in accordance with the provisions of this section and that no person rectifying distilled spirits or wines in such warehouses shall be subject by reason of such rectification to the payment of special tax as a rectifier." *19 U.S.C.A. § 1311.*

Regulations have been promulgated pursuant to the Internal-Revenue Laws and Customs Laws and are located at 19 C.F.R. parts 8, 12, 18, 19, 21, 23 and 25. In effect the statutes and regulations control the business of exportation of Ammex, Inc. so that the property is continually treated as "in bond" and in a continual process of exportation. Each bottle sold is treated as being in the custody of the customs officials until the purchaser crosses the border.

QUESTION:

Whether the property of Ammex Warehouse, Inc. is property "within the State" and thus subject to local property taxation by the town of Van Buren.

ANSWER:

No.

REASONS:

In order to be subject to personal property taxation, property of non-residents must

be located within the State of Maine. *36 M.R.S.A. § 603(3).* Although the question of property taxation of liquor being stored at border points for export sales has not been raised previously, the question of jurisdiction to tax has been the subject of litigation involving Ammex in other states.

California attempted to bar Ammex from operating in that state since its operations did not fall within any of the categories subject to the licensing laws. *Ammex Warehouse, Inc. Department of Alcoholic Bev. Con.,* 224 F. Supp. 546 (1963). The key question for determination was whether the goods became part of the common mass of property within the state. The facts, in part, are quoted from the opinion of the Court:

> "The Plaintiffs are two California corporations which have worked out a method of doing business, consisting of handling liquor, "in bond" and exporting it to Mexico.
>
> . . . .
>
> . . . . Each bonded warehouse consists of a bonded storage area and adjoining such warehouse is a display room open to the public, used to display empty bottles of the brands stored in the bonded warehouse. Customers will not be permitted to enter the bonded warehouse area, but may enter the display room, pay for liquor and receive a receipt for the purchase. No liquor is delivered until it is exported.
>
> All liquor handled by plaintiffs will be 'in bond' for exportation out of the State of California. It will be imported into the State of California for exportation only. The liquor will be 'in bond' continually until the delivery to the customer as described hereafter.
>
> The liquor will leave bonded warehouses of manufacturers or distributors pursuant to 'withdrawal entry' as provided by the Customs Service, and will be shipped to the plaintiffs at the two ports, but will be consigned in care of the Collector of Customs at the two ports. The carrier will unload the liquor from its bonded truck into its bonded warehouse, which is under government seal, and notify the Customs of the arrival of such shipment. The liquor will then be transported in bond to the bonded warehouses of the plaintiffs.
>
> By arrangements worked out with the United States Collector of Customs of San Diego, the United States Bureau of Customs will keep a U.S. Customs Officer stationed at Plaintiff's respective warehouses six a week. These officers will be employees of Customs and paid by the U.S. However, under federal law, reimbursement will be made monthly to the United States by the plaintiffs for their salaries.
>
> . . . .
>
> All liquors sold by plaintiffs will be delivered to the office of the U.S. Bureau of Customs located within such strip and the export officer stationed there will see to it that the liquor is exported and will so certify . . . .
>
> . . . . We find that the customer received *custody* of the liquor moments before crossing the border, but that the *possession* of the liquor in a legal sense is in the U.S. Customs Export Officer, since he has allowed the custody of the liquor to the customer for the sole purpose of crossing the border. If he does not cross the border, the custody may be taken from the customer.
>
> Under these facts, we conclude that there is no complete and full delivery to the customer until the moment that he crosses the border; up to that moment he merely has physical custody of the liquor under the control and possession of the U.S. Customs Export Officer." *Id., p. 548, 549.*

After discussing the commerce laws and the export and import laws the court

concluded that "the goods are 'in bond' or under control of the U.S. Customs until the moment of export. They never become part of the common mass of goods in the State." *Id. p. 555.*

It should be noted in passing that there is no prohibition from regulation, licensing, taxing, prohibiting the delivery or use of liquor within a state since the 21st Amendment grants this power to the state. The primary question however, is *whether the goods have come to rest within the State of Maine so that they can become subject to the taxing authority of the town or the state.*

Although in most cases it would be considered that export did not begin until there had been an actual sale and a delivery to a carrier for the purpose of removal of the product, here we have a situation controlled by federal statute, which control is initiated outside of the State of Maine and continues until the product is removed from the state and the country. Although the facts of the decided cases are not necessarily similar to the Maine situation, we assume that there is compliance with the statutes and regulations of the federal government.

The reasonable conclusion to be reached is that the property never comes to rest for tax purposes within the State of Maine because it is treated by federal law as exported merchandise throughout the warehousing and transportation process.

JAMES M. COHEN
Assistant Attorney General

April 4, 1969
Executive

Governor Kenneth M. Curtis

Retirement benefits and mileage allowances; are they emoluments.

SYLLABUS:

The term "emoluments" appearing in Article IV, Part Third, Section 10 of the Maine Constitution does not include retirement benefits or mileage allowances.

FACTS:

The Constitution of Maine contains the following proviso regarding the appointment of legislators to civil offices of profit in this State:

> "No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any civil office of profit under this State, which shall have been created, or the emoluments of which increased during such term, except such offices as may be filled by elections by the people." *Constitution of Maine,* Article IV, Part Third, Section 10.

During the present legislative session, both the retirement benefits and the automobile mileage allowance may be increased: L. D. 480 (mileage allowance); L. D.'s 565; 576; 871; 992; 993; and 994 (retirement benefits). One of the members of this present Legislature proposes to resign and to accept an appointment to a civil office of profit in Maine. Although the salary of the reference office is not to be increased by this Legislature, the office to which the person is to be appointed participates in the State retirement program and mileage allowance provision.

QUESTION:

Would an increase in retirement benefits or mileage allowances constitute an increase in "emoluments" within the meaning of Article IV, Part Third, Section 10 or the Maine Constitution?

ANSWER:

No.

REASON:

The Federal Constitution (Article 1, § 6, par. 2) and many state constitutions contain a provision substantially to the effect that a member of Congress or a legislature shall not, during the term for which he was elected, be appointed or elected to any civil or public office which shall have been created or the emoluments of which shall have been increased during the term for which he was elected a member of Congress or of the legislature. *118 A.L.R. 182.* The purpose of such provisions is to prevent the members of the legislative body from creating public offices or increasing the emoluments of those already in existence, with a view towards occupying such offices themselves. State v. Gooding (1912), 22 Idaho 128, 124 P. 791; Westernport v. Green (1923), 144 Md. 85, 124 A. 403.

In *State ex rel. Todd v. Reeves* (1938) 196 Wash. 145, 82 P.2d 173, 118 A.L.R. 177, the Court considered the nature and character of emoluments in the state constitutional provision similar to the Maine constitutional mandate herein considered. There, the court held that a statute providing for retirement of judges enacted during the term of the legislator in question, did not disqualify such member of the legislature from seeking the office of judge because such Act did not increase the emoluments of the office of judge. The court took the view that emoluments, as used in the state constitution, contemplated actual pecuniary gain, rather than some imponderable and contingent benefit such as the retirement benefits. The court also noted that although the retirement benefits statute made the office of judge more desirable for a candidate, this was not tantamount to an increase in emoluments. I should call attention to the fact that the reference Washington State case was not a unanimous opinion. Two of the eight members of the court dissented.

State ex rel. Todd v. Reeves, supra, is valid authority today; it has been followed as recently as 1967 in *Bulgo v. Enomoto* (Hawaii), 420 P.2d 327. In that case, the Supreme Court held that the enactment of a statute which applied generally to public employees entitling them to receive the difference between regular salary and temporary disability compensation; under a workmen's compensation law did not increase emoluments of the office of county commissioner so as to disqualify a member of the legislature which enacted that statute from holding the office of county commissioner under a constitutional provision similar to that under study here. The court thought that the temporary disability compensation contemplated in the statute was too remote and contingent in order to disqualify the person in question.

In *State ex rel. Todd v. Reeves,* an "emolument" is defined thus:

> "The word 'emolument' is defined in Webster's dictionary as 'profit from office, employment, or labor; compensation; fees or salary'. This definition is substantially the same as that found in the decisions of the courts. That the word was employed in the constitution in its ordinary sense, as implying actual

pecuniary gain, rather than some imponderable and contingent benefit, can hardly be questioned." *Id.*, 175.

We now take up the matter of mileage allowances, otherwise known as travel expenses, and advise that such allowances are not emoluments within the meaning of that term as used in the subject constitutional sense. Our position is grounded upon authorities such as *Spearman v. Williams* (1966), Okla., 415 P.2d 597, where it was decided that expenses incurred by members of a legislative council for office rent and travel were not salary or emolument within the meaning of constitutional provisions prohibiting members of the legislature from receiving compensation other than salary or emoluments.

Courts generally hold that travel expenses incurred by public employees "are expenses of the performance of official duties and are not compensation, salary or emoluments * * * ." *Ibid.* After all, the only object of an allowance of expenses is to preserve the officer's salary to him free of encroachments thereon, through expenses imposed by his official position. *McCoy v. Handlin,* 35 S.D. 487, 153 N.W. 361.

JOHN W. BENOIT, JR.
Assistant Attorney General

April 9, 1969
Legislative Finance

William H. Garside, Legis. Fin. Officer

SYLLABUS:

Language in the Appropriation Act stating that job reclassifications must not result in an increased request for funds from legislature can prevent upward reclassifications unless accompanied by comparable amount of downward reclassification.

FACTS:

In the fourth paragraph of the 1967 General Fund Appropriation Act, P. & S. L. 1967, Chapter 154, and the third paragraph of the General Fund Appropriation Act, P. & S. L. 1967, Chapter 225, is the following language:

"To provide some degree of flexibility, each department, institution or agency may apply to the Personnel Board for an exchange between job classifications, and such action may be approved if by so doing the total amount determined to be available for Personal Services, in such account, for any one year is not exceeded, and also providing that certification is made, in writing, that such action will not result in an increased request for Personal Service moneys from the Legislature."

QUESTION:

Does the quoted language prevent reclassification and range changes?

ANSWER:

See REASONS.

REASONS:

The portion of the above quotation that raises the question, "and also providing that certification is made, in writing, that such action will not result in an increased request for Personal Service moneys from the Legislature" first appeared in the 1965 General Fund Appropriation Act, P. & S. L. 1965, Chapters 78 and 159. This added provision changed the meaning of the provision as it had previously been written. As a matter of fact, this additional clause virtually nullified the original language. Previously, the Legislature had said that departments could reclassify positions and move personnel into new positions as long as money was available within the appropriation.

The new language which was added said that reclassification and moving of positions not only must be done within the money appropriated, but in such a manner as not to result in an increased request for funds from future Legislatures. This means that reclassifications upward are virtually stopped. Any reclassification of a position upward would necessarily cause an increase request for funds in the future, except insofar as a department may also lower job classifications on sufficient positions to offset any upward reclassifications.

GEORGE C. WEST
Deputy Attorney General

April 22, 1969
Real Estate Commission

Leo M. Carignan, Exec. Secretary

Publication of Enforcement Information under 32 M.R.S.A. § 4057

SYLLABUS:

Maine Real Estate Commission may publish information relative to the enforcement of their laws which it deems of interest to the public.

FACTS:

The Real Estate Commission feels that in the best interest of its licensees it will publish in its quarterly newsletter information relative to recent cases which involved enforcement of its license laws.

QUESTION:

May the Commission publish in its quarterly newsletter the pleadings and decisions in such cases.

ANSWER:

Yes.

REASON:

The Commission may publish what it deems of interest to the public relative to

enforcement of their laws and is required by law to publish the names of those whose licenses were suspended or revoked in the year preceeding the publishing of the list of the licensees. 32 M.R.S.A. § 4057. Inasmuch as pleadings, decisions and docket entries are public, the Commission may publish them. The Commission, of course, must present the information fairly.

In the event that the Commission wishes to publish such information, it should publish all the pleadings and the decision, not merely excerpts therefrom; or in the alternative, publish only the decision.

GARTH K. CHANDLER
Assistant Attorney General

May 7, 1969
Parks & Recreation

Lawrence Stuart, Director

Disposition of Buildings in the Restricted Zone of the Allagash Wilderness Waterway

SYLLABUS:

Determination of what structures are to remain in the restricted zone of the Allagash Wilderness Waterway lies with the State Park and Recreation Commission and there is no necessity for Governor and Executive Council approval for the tearing down and removal of structures within the restricted zone.

FACTS:

The Act creating Allagash Wilderness Waterway provides, inter alia, that the State Park and Recreation Commission is required to remove all existing structures within the restricted zone of the waterway not necessary to the operation of the waterway.

QUESTION:

Is it necessary to obtain Governor and Executive Council approval to tear down and remove any buildings or other structures which are not needed in the operation of the waterway?

ANSWER:

No.

OPINION:

12 M.R.S.A. § 666, subsection 1 reads as follows:

"1. Structures. No new structures or expansion of existing structures shall be permitted within the restricted zone, except those structures essential to state service agencies, those structures determined by the commission to be essential in maintaining water level controls, and such temporary structures as may be determined by the commission to be necessary for watercourse crossing and access. *All existing structures are to be removed except those deemed necessary by the commission to carry out the intent of this chapter.*" (Emphasis supplied.)

Thus, an express legislative mandate has been given to remove all existing structures except those necessary to carry out the intent of the chapter creating the Allagash Wilderness Waterway. If the legislature desired the State Park and Recreation Commission to receive prior Governor and Executive Council approval before removing a structure within the restricted zone of the waterway, the legislature would have made a statutory proviso to that effect. There is no such proviso. To the contrary, discretion is lodged with the State Park and Recreation Commission to determine what structures are necessary to carry out the intent of the legislature in creating the Allagash Wilderness Waterway.

JEROME S. MATUS
Assistant Attorney General

May 12, 1969
Bureau of Mental Health

William E. Schumacher, M.D., Director

Liability of State of Maine for Medical Expenses Incurred with Regard to Treatment of State Hospital Patient for Self-inflicted Gunshot Wound Occurring at Patient's Parental Residence.

SYLLABUS:

The State is immune from suit for the recovery of medical expenses incurred with respect to the treatment of a state hospital patient for a self-inflicted gunshot wound occurring away from the State Hospital at the patient's parental home. Action of the Legislature would be necessary to permit such suit. Absent negligence in permitting the release of a State Hospital patient to her parental home the State cannot be held liable for medical expenses incurred with respect to treatment of such patient for a self-inflicted gunshot wound occurring away from the State Hospital at the home of her parents.

FACTS:

The patient in question was admitted to the State Hospital in May, 1961. She was divorced from her husband in 1963, his responsibility for support of the patient being limited to $1.00 per month. From the date of admission until 20 November 1968, the patient had on frequent occasions been released from the State Hospital to reside temporarily with her parents, one such occasion occurred in June of 1968. In October 1968, the mother of the patient included a comment in a personal letter to a social worker of the hospital, addressed to the social worker's personal address, relative to the patient during the June visit having been found with the kitchen doors closed and the range gas jets on. The parents immediately returned the patient to the State Hospital. No other comment was ever made with respect to this alleged incident and it was not brought to the attention of any physician of the State Hospital until 7 December 1968. The medical records at the institution show no indication of there having been suicidal tendencies manifested by this patient.

On 20 November 1968, this patient was transported to her parental home, the visit having previously been arranged with her parents with the approval of the attending State Hospital physician. On 25 November 1968, the patient shot herself in the

abdomen, was hospitalized therefor at great expense at a local hospital and was on 30 November 1968 returned to the State Hospital.

It was with a firearm available to her at the parental home that at, or about 4 a.m. on 25 November the patient, having removed the weapon and cartridges from their usual location shot herself in the manner above mentioned.

The parents now request that the State of Maine pay all bills incurred in the administration of medical treatment for the gunshot wound.

QUESTION:

Is the State liable for medical expenses incurred for the treatment of an adult patient for a self-inflicted gunshot wound occurring away from a State Mental Hospital, at the home of her parents, absent negligence on the part of the State's physicians in permitting release of the patient to the parental home?

ANSWER:

No.

REASON:

The "sovereign immunity" doctrine applies here and is stated as follows:

> "The rule is well settled that the state, unless it has assumed such liability by constitutional mandate or legislative enactment, is not liable for injuries arising from the negligent or other tortious acts or conduct of any of its officers, agents, or servants, committed in the performance of their duties. . . ."
>
> 49 Am. Jur. States, Territories, and Dependencies, § 76, 288
>
> "The rule of non-liability of the state for the torts of its officers, agents, and servants applies to those agencies through which the state acts in the administration of government as well as to the state itself. Thus, state institutions, such as hospitals and asylums for the care of mental defectives, houses of correction, industrial and reform schools, and the like, and other such institutions as agencies of the state are exempt from liability for torts of officers, agents, or servants of such institutions. Thus, the officers of the state in charge of such institutions are not liable in tort for acts in the exercise of an official discretion, or for the negligence or wrongs of their subordinates."
>
> 49 Am. Jur. States, Territories, and Dependencies, § 78, 291, 292

Legislative action would be required to permit suit against the State for the medical expenses under discussion. Any such suit under the facts must be based upon a negligence theory.

To take the position that the State is immune from suit in the instant matter may be considered dispositive of it. There is no existing authority for the payment of such medical expenses by the State, nor do we view such expenses to be appropriately the responsibility of the State.

The fact that the parents of the patient did not sign any agreement assuming responsibility for the patient at the time she was received into the parental home on 20 November 1968 is of no consequence.

The fact that the hospital is under a duty to provide a high standard of care and treatment to its patients is irrelevant as to the issues raised here with respect to the extraordinary medical expenses incurred due to the self-inflicted gunshot wound. It is

also irrelevant that the parents cannot be held liable for the patient's support at the State Hospital under Title 34, Chapter 195, since that Chapter relates only to care and treatment in a State Hospital subject to rates fixed by the Department of Mental Health and Corrections and is unrelated to medical expenses of the type in question.

In order for the State to be held liable in the event an action were authorized by the Legislature it must be proved that the State by its authorized agents was negligent.

COURTLAND D. PERRY
Assistant Attorney General

May 16, 1969

Honorable Charles T. Trumbull
Executive Council Chambers
State House
Augusta, Maine

Dear Councillor Trumbull:

You have presented two questions for consideration involving: (1) Public Administrators and (2) the State Contingency Account.

(1) Does a public administrator of a county, appointed for a term of 4 years pursuant to 18 M.R.S.A. §1651, serve until his successor is appointed and qualified, or does the term of a public administrator expire by operation of law at the conclusion of 4 years? The Governor, with the advice and consent of the Executive Council, appoints public administrators in each of the counties of the State for terms of 4 years. In order to determine whether a public administrator is permitted to hold office for a term exceeding the statutory 4-year period, it is necessary to determine whether a public administrator is a civil officer within the meaning of 5 M.R.S.A. § 3. Section 3 permits a civil officer to hold office during the term for which he is appointed and for the further period of time until his successor in office is appointed and qualified. A public administrator has been regarded as a public officer. *Los Angeles County v. Kellogg,* 146 Cal. 590, 80 P. 861; and *In Re Miller's v. State,* 5 Cal. 2d 588, 55 P. 2d 491. A civil officer is one regarded as an officer who is in public service but who is not of the military. *U.S. v. American Brewing Co.,* 296 F. 772, and *State v. Clarke,* 21 Nev. 333, 31 P. 545. We conclude that a public administrator is a civil officer and, therefore, holds office during the term for which he is appointed and until his successor in office has been appointed and qualified. *5 M.R.S.A. § 3.*

(2) You next ask whether amounts from the State Contingent Account may be allocated to a state department for one of the reasons set forth in 5 M.R.S.A. §1507, in anticipation of the department's receipt of future revenues, with a proviso that such allocation be reimbursed in the same fiscal year that the allocation occurs? We answer in the affirmative. The third sentence of §1507 provides that the Governor and Executive Council shall determine the necessity for allocations from the State Contingent Account. In the event that the allocation is reimbursed by the department in the same fiscal year in which that allocation occurs, and provided the allocation is made for a purpose specified in §1508, it appears that the making of such an allocation in anticipation of the receipt of revenues and its reimbursement would not be illegal. Whether one of the conditions specified in §1508 exists as a condition precedent to the allocation, is a question of fact to be determined by the Governor and Executive Council in the exercise of their discretion. *Vandegrift v. Riley,* 220 Cal. 340, 30 P. 2d 516.

Thank you for your attention.

Very truly yours,
JOHN W. BENOIT, JR.
Assistant Attorney General

May 19, 1969
Board of Dental Examiners

Glen R. Hansen, D.M.D, Secretary

Supervision of Dental Hygienist

SYLLABUS:

The practicing of dental hygiene as part of the formal training of a dental hygienist requires the presence of a licensed dentist.

FACTS:

A school of Dental Hygiene employs three dental hygienists to serve as instructors and schedules licensed dentists on a volunteer basis to be present whenever the students practice dental hygiene on patients.

QUESTION:

Does Maine Dental Law require a licensed dentist to be present when students practice on patients?

OPINION:

Yes.

REASONS:

32 M.R.S.A. § 1095 states:

> Dental Hygiene shall mean the treatment of human teeth by scaling, polishing, planing and removing therefrom calcareous deposits, and by removing accumulated accretion from directly beneath the free margins of the gums; the making of x-ray exposures of teeth and surrounding tissues; the clinical examination of the teeth and surrounding tissues for carious lesions, periodontal pockets and other abnormal conditions; the obtaining and recording of basic medical and dental histories and information; the instruction of patients in proper tooth care; the application of fluoridies or other substances beneficial in the control of caries; the application of desensitizing agent; the polishing and smoothing of rough edges of restorations, and the cementing of facings and pontics outside of a patient's mouth; provided that nothing in Maine Revised Statutes shall be so construed as to effect the practice of medicine or dentistry nor to prevent students of a dental college, university or school of dental hygiene from practicing dental hygiene under the supervision of their instructors; and, *provided* that *nothing in Revised Statutes shall be construed to authorize any dental hygienist to perform any operation in a patient's mouth without general supervision of a dentist within a dentist's office, a public or private institution,* or for the Department of Health and Welfare. (Emphasis supplied.)

As long as the acts which the students perform are not acts amounting to the practice of dentistry, but are acts that a student may perform under conditions indicated in the provisions of § 1095 above, i.e., under supervision of their instructor, they are proper.

However, the instructors, being licensed Dental Hygienists, must have general supervision by a licensed dentist when performing any operation in a patient's mouth.

GARTH K. CHANDLER
Assistant Attorney General

May 19, 1969

To: Ernest H. Johnson, State Tax Assessor, Bureau of Taxation

Subject: Insurance Premium Tax

SYLLABUS:

THE INSURANCE PREMIUM TAX APPLIES TO AN INSURANCE COMPANY THAT SELLS INSURANCE SOLELY THROUGH THE MAIL ON RISKS LOCATED OR RESIDENT IN MAINE; IS NOT LICENSED; AND HAS NO AGENTS, REPRESENTATIVES, EMPLOYEES OR PLACE OF BUSINESS IN THE STATE OF MAINE.

ASSESSMENT MAY BE MADE FOR PREMIUMS COLLECTED AND NOT TAXED IN PRIOR YEARS.

FACTS:

The insurance premium tax is administered under sections 2511 through 2522 of Title 36 of the Revised Statutes. Imposition of the tax is provided in 36 M.R.S.A. § 2513:

> Every insurance company or association which does business or collects premiums or assessments including annuity considerations in the State . . . shall, for the privilege of doing business in the State, and in addition to any other taxes imposed for such privilege annually pay a tax upon all gross direct premiums including annuity considerations, whether in cash or otherwise, on contracts written on risks located or resident in the State for insurance of life, annuity, fire, casualty and other risks at the rate of 2% a year.

A question has arisen regarding the taxation of unlicensed insurance companies and more particularly unlicensed companies that are doing business from locations outside the State solely by mail.

QUESTIONS:

1. Does the insurance premium tax apply to an insurance company if it is not licensed by the Insurance Department, has no agents, representatives, or place of business in the State of Maine, but sells insurance solely through the mail on risks located or resident in Maine?
2. If such a company is liable for the insurance premium tax, can assessment now be made for premiums collected in prior years?

ANSWERS:

1. Yes.
2. Yes.

REASONS:

1. An insurance company need not be licensed by the Insurance Department for the company to be liable for the insurance premium tax. The tax is imposed for the privilege of doing business in this State. Section 2513, which imposes the tax, requires only that the company must be one which "does business or collects premiums or assessments . . . in the State . . . on risks located or resident in the State."

Although insurance is "commerce" within the concept of the interstate commerce clause, the McCarren Act, 15 U.S.C.A. § § 1011-1015, has expressly provided that the "business of insurance . . . shall be subject to the laws of the several states which relate to the regulation or taxation of such business", (§ 1012). Therefore, the only constitutional objection to taxation of insurance business would be due process.

If there are absolutely no contacts with the State by the insurance company, even if the insured risk is located here, there can be no regulation or taxation. *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962). However, the conduct of mail order insurance, whereby minimal contacts such as solicitation, offer, acceptance, and payment of premiums, occurs by mail, has been held to be "doing business" sufficient to subject a company to the regulatory jurisdiction of the State. *Opinion of the Attorney General,* March 3, 1969. See also *People v. United Nat'l Life Ins. Co.*, 58 Cal. Rptr. 599, 427 P 2d 199 (1967).

For purposes of the insurance premium tax, if minimal contacts can be found which would justify subjecting the company to the licensing requirements of the Insurance Department, under state law, whether or not such company was in fact licensed, liability for the tax exists.

When the insured risk is located or resident in Maine and there are some business contacts with this state the insurance company is subject to the taxing jurisdiction of Maine. The question now arises whether this is consistent with constitutional due process.

If jurisdiction to tax is based upon the same criteria as jurisdiction to regulate, there appears to be no problem. See "*Ministers Life & Casualty Union v. Haase: The new Trend in State Regulation of Unauthorized Mail Order Insurance Companies*", 43 Notre Dame L. 157 (1967).

Whether the taxation of mail order insurance companies violates due process is a question which has yet to be answered specifically by the Supreme Court of the United States, or the highest court of any state. The Supreme Court of the United States, has held that there is no due process deprivation of property by the taxation of premiums paid outside the taxing state by residents of the taxing state to a company which maintained an office or agents in the taxing state. *Equitable Life Society v. Penna.*, 238 U. S. 143 (1945). This result can be extended to mail order companies doing business in Maine.

Giving aid to this conclusion is the following language of the Supreme Court:

> Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. "Taxable event," "jurisdiction to tax," "business situs," "extraterritorialty," are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. *That test is whether property*

was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business . . . which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a (privilege) tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. (Emphasis supplied) *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940).

The types of "protection, opportunities and benefits given by the state" are discussed in *People v. United Nat'l Life Ins. Co.*, supra. One primary protection or benefit afforded by the State is the availability of the courts to resolve disputes arising out of the contracts of insurance. Certainly the income derived from Maine risks is a substantial benefit.

The tax exacted for the privilege of doing business in this State, therefore, does not deprive the insurance company of property without due process.

2. When the State Tax Assessor learns that an insurance company has been conducting business in Maine without license and without payment of tax, the question arises whether he can assess insurance premium taxes for any or all years prior to the current year.

To determine the answer it becomes necessary to interpret the language of the insurance premium tax statute in conjunction with what the legislature intended to be the result.

First, there is the language of 36 M.R.S.A. § 2516 which requires every company doing business in Maine to file an annual return:

"Every company or association which by sections 2511 and 2513 is required to pay a tax shall on or before the first day of each March, make a return under oath to the State Tax Assessor, stating the amount of all gross direct premiums written by said company, either in cash or otherwise, on risks located or resident in this State during the year ending on the 31st day of December previous, the amount of direct return premiums thereon and dividends paid to the policyholders on direct premiums during said year." 36 M.R.S.A. § 2516.

Section 2516 refers back to § 2513 which is quoted in the FACTS. The tax is computed by the company on the return and may be paid with the return by March 1.

If a company does not pay its obligation with the return, the State Tax Assessor routinely assesses the privilege tax before April 15, which becomes due and payable on May 1.

"The taxes imposed by sections 2513 . . . shall be assessed by the State Tax Assessor on or before the 15th day of April annually, and the same shall be paid to the State Tax Assessor on or before the first day of May following." 36 M.R.S.A. § 2522.

If a company fails to make a return the State Tax Assessor is directed to make an assessment and demand payment.

"If any insurance company or association refuses or neglects to make the return required by sections 2516 . . . the State Tax Assessor shall make such assessment on such company or association as he deems just, and unless the same is paid on demand, the State Tax Assessor shall certify to the Insurance Commissioner that payment of such tax has not been made and such company or association shall do no more business in the State, and the Insurance

Commissioner shall give notice accordingly." 36 M.R.S.A. § 2518.

Under ordinary circumstances an insurance company is licensed to do business in Maine and the State Tax Assessor is aware of its existence. If such a company fails to file a return for the current year the State Tax Assessor will assess the tax on the basis of prior returns. The problem arises when neither the Insurance Department nor the State Tax Assessor knows that an insurance company has been doing business in the State.

The legislature certainly did not intend to exempt such companies from taxation. Section 2518, which authorizes an assessment upon failure of a company to "make the return required" does not itself set a limitation of time. Referral back to § 2516 indicates that an annual return is to be filed. It might be argued by implication that the assessment made pursuant to § 2518 is limited to one year. However, the language does not specifically limit the State Tax Assessor. An extension of case law would indicate that unless there is a specific limitation against the State by statute, there is no restraint on the State in the assessment or collection of taxes. See generally *Cape Elizabeth v. Skillin,* 79 Me. 593, 595, *State v. Crommet,* 151 Me 188, 193. By itself, § 2518 does not limit the action of the State Tax Assessor.

California upheld an assessment in a succeeding year without clear statutory permission.

> "It is contended by respondent that, if a tax might be validly assessed, the only proper time was in March, 1932, and that, such time having passed, it was no longer possible to make a valid assessment. The authorities . . . . are not determinative of the question whether in a subsequent year, at the regular time for making assessments, an omitted assessment may be made, and on this question we have found no authority squarely in point. Despite the lack of authority, however, we believe the circumstances of this case indicate clearly the proper decision. Respondent's position is, in substance, that by violation of its statutory duty to report, and thus accomplishing a concealment of its liability for the tax, the company or its representative has acquired a complete exemption therefrom. We cannot subscribe to this view, which would not only permit the company to profit by its own wrong, but would deprive the state of its legal claim for taxes in a wholly arbitrary manner. We are in accord with the contention of the state that the tax liability is imposed by the constitutional and statutory provisions (Cal. Const., art. 13, § 14, as amended in 1930; Pol. Code, § 3664b), and is an obligation of the taxpayer irrespective of the assessment thereof by the board. If the delayed assessment in the present case were an error caused by the board's own neglect, to the substantial injury of the taxpayer, it might be that a different conclusion would be indicated; but in the instant case the error was a direct result of the taxpayer's violation of its statutory duty, and there is no showing that the delay in assessment has operated unfairly to its prejudice. And these facts which disprove any prejudice or injury to the taxpayer likewise make out a case of an estoppel against the company and its representative to deny the validity thereof.
>
> While we are satisfied that the conclusion reached herein is sound in principle, we may observe that the situation is one which called for legislative action, and in 1937 the Political Code was amended by the addition of section 3669 (St. 1937, pp. 80, 340) which authorizes assessment in a subsequent year after discovery of failure to make it in a prior year." *Carpenter v. Pacific Coast Ins. Ass'n.* 74 P 2d 511 (1937).

It might be noted that there exists a general two year limitation after the original assessment for the assessment of supplemental taxes. This section is inapplicable to the present situation since no original assessment was made.

There are no Maine cases on point, but the statute of limitation cases cited supra do give aid to the conclusion reached. The authority of the State Tax Assessor to make an assessment upon failure of the taxpayer to file a return is granted by statute and is not limited by that statute.

JAMES M. COHEN
Assistant Attorney General

May 22, 1969
Mental Health and Corrections

William F. Kearns, Jr., Commissioner

Appointment of Director of Mental Health to Office of Director of Mental Retardation

SYLLABUS:

It is inconsistent with the intent and purpose of the Legislature to appoint the Director of Mental Health to the position of the Director of Mental Retardation, in addition to his current duties in the first capacity.

FACTS:

The 103rd Legislature enacted § 2061 and § 2062 of Title 34 of the Revised Statutes creating the Bureau of Mental Retardation and the position of Director of Mental Retardation, which statutes become effective on July 1, 1969. The Legislature did not, at that time, and has not since, funded the Bureau of Mental Retardation or the position of Director of Mental Retardation.

QUESTION:

Can the Director of Mental Health be appointed by the Commissioner of Mental Health and Corrections to the position of Director of Mental Retardation, which latter position would be in addition to the current function as the Director of Mental Health?

ANSWER:

No.

REASON:

Legislative intent appears clear here, that there be established two separate bureaus – the Bureau of Mental Health and the Bureau of Mental Retardation. It is also specifically provided that there shall be appointed two officials – the Director of Mental Health and the Director of Mental Retardation. It is our opinion that the Legislature expressed in these separate enactments its view that, the needs of the State demand two separate bureaus and two separate directors in the areas of mental health and mental retardation. The statute creating the position of Director of Mental Retardation requires that the appointment thereto be subject to the Personnel Law. It would, therefore, appear that the Commissioner could not just arbitrarily appoint the Director of Mental Health to this

office, and since funds are unavailable for the payment of the salary in connection with this position, it is impossible to make an appointment to this position, subject to the Personnel Law. It would appear that if the 104th Legislature does not fund the Bureau of Mental Retardation, including salary for the position of Director of Mental Retardation, the Commissioner of Mental Health and Corrections may appoint the Director of Mental Health as *acting* Director of Mental Retardation, since the Bureau of Mental Retardation becomes effective as of July 1, 1969, and will require some leadership. The actual appointment of a Director of Mental Retardation, in our view, will have to await funding by the Legislature.

COURTLAND D. PERRY
Assistant Attorney General

May 26, 1969
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Application of sales and use tax to certain credit unions

SYLLABUS:

THE TELEPHONE WORKERS CREDIT UNION OF MAINE, THE RAILROAD WORKERS CREDIT UNION OF MAINE, AND THE GOVERNMENT EMPLOYEES CREDIT UNION OF MAINE ARE SUBJECT TO SALES AND USE TAX LAW OF MAINE.

FACTS:

Three credit unions: Telephone Workers Credit Union of Maine, Railroad Workers Credit Union of Maine, and Government Employees Credit Union of Maine have requested Sales and Use Tax exemptions.

Each credit union was created by private and special acts of the legislature. P. & S. L., 1921, c. 93; P. & S. S., 1927, c. 131; P. & S. L., 1931, c. 11.

The charters, as amended by P. L. 1961, c. 385, § § 16, 17, 18, similarly provide:

> "The Revised Statutes of 1954, Chapter 55, Section 3 pertaining to credit union fees and assessments shall apply to said corporation. The aforesaid fees and assessments shall be in lieu of all other state and municipal taxes to said corporation and all the deposits of shareholders and investments and other property of the corporation shall be exempt from state or municipal taxation to the corporation, excepting real estate owned by the corporation and not held as collateral security, which may be taxed in the town or city in which the same is located. The deposits of shareholders shall be exempt from municipal taxation to shareholders."

The public laws of credit unions provide:

> "No part of chapters 241 to 251 shall be construed as repealing, modifying or amending the provisions of any private and special acts authorizing the organization and defining the purposes of corporations of similar nature." 9 M.R.S.A. § 2605.
>
> "Credit union shares of corporations organized under chapters 241 to 251 shall be tax exempted and no taxes or charges, except as otherwise provided, shall

be assessed against them." 9 M.R.S.A. § 2762.

"Credit unions shall be under the supervision of the Commissioner, and sections 2, 6, 7, 171 and 172 shall be applicable to credit unions in the same manner that they apply to financial institutions. Semiannual assessments required by section 2 shall be computed in the manner prescribed therein for loan and building associations." 9 M.R.S.A. § 2542. (Formerly R.S. 1954, c. 55, § 3)

". . . assess semiannually each loan and building association . . . at the annual rate of 7 cents for each $1000 of average total resources . . . ." 9 M.R.S.A. § 2.

QUESTION:

Are the named credit unions subject to the Sales and Use Tax Law?

ANSWER:

Yes.

REASONS:

The Maine Constitution provides:

"The legislature shall, from time to time, provide as far as practicable, by general laws, for all matters usually appertaining to special or private legislation" Art. IV, Part Third, § 13, Maine Constitution.

"Corporations shall be formed under general laws and shall not be created by special acts of the Legislature, except for municipal purposes, and in cases where the objects of the corporation cannot otherwise be attained, and however formed, they shall forever be subject to the general laws of the State." Art. IV, Part Third, § 14, Constitution of Maine.

The three credit unions under consideration were created, respectively, in 1921, 1927 and 1931. The general laws pertaining to credit unions were adopted by P.L. 1941, ch. 234. Since 1941, the public law prevails in the regulation of credit unions. *A. H. S. v. Mahoney,* 1961 Me. 391, 402-406 (1965).

Subjection to sales and use taxation is based upon two alternative approaches. One is statutory construction and the other is constitutional.

As a matter of statutory construction, the charter provision which purportedly exempts the credit unions from "all other state and municipal taxes" must be read in conjunction with the general law applying to credit unions. Thus read the limitation on taxation becomes restricted in application. The reference to fees and assessments as being in lieu of all taxes directs us to 9 M.R.S.A. § 2 which imposes the fees and assessments. The fees and assessments are imposed to defray the administrative costs of the Department of Banks and Banking. At most the assessment is in the nature of a business tax or a tax on shares, as such the construction of the limiting language in the charter would be similar to the language of § 2762 of Title 9. That is, no other state or municipal tax with respect to credit union shares shall be assessed.

All other credit unions are subject to sales and use tax, since the sales and use tax is not a tax upon shares. It is a tax on the sale of tangible personal property or the use of tangible personal property purchased at retail sale. If the legislature had intended to exempt the credit unions from sales and use tax it would have specifically exempted them in 36 M.R.S.A. § 1760. Exemptions from taxation must be strictly construed. *Town of Owls Head v. Dodge,* 151 Me 473 (1956); *Holbrook Island Sanctuary v. Inhabitants of Town of Brooksville.,* 161 Me 476 (1965).

Notwithstanding the statutory construction approach, if the charter provision is accepted literally, the credit unions in question are still subject to sales and use tax on constitutional grounds.

Thus, even though the general laws dealing with credit unions govern their activities, the charters of the three organizations specifically exempt them from all state and municipal taxation, whereas all other credit unions organized pursuant to Title 9 are exempt only with respect to their shares.

The crucial question for determination is whether the special tax exemption given to the three credit unions is a denial of equal protection. The following authorities are relied upon in arriving at the conclusion that special treatment of the three credit unions is unconstitutional.

". . . nor deny to any person within its jurisdiction the equal protection of the laws." Amend. 14, § 1, Constitution of the U.S.

"No person shall be . . . denied the equal protection of the laws . . . ." Art I, § 6-A, Constitution of Maine.

The general interpretative principles upon which factual situations may be analyzed with respect to the equal protection clause have been extracted from case law and are set forth:

"The inhibition of the Fourteenth Amendment that no person should be deprived of the equal protection of the law is designed to prevent any person or class of persons being singled out as a special subject for discriminating or favoring legislation." *Boothby v. Westbrook,* 138 Me. 117, 123, (1941).

"The specific regulations for one kind of business which may be necessary for the protection of the public can never be just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges upon the same conditions.

. . . .

"The inhibition of the Fourteenth Amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person, or class of persons, from being singled out as a special subject for discriminating and hostile legislation." *State v. Montgomery,* 94 Me. 192, 205-206 (1900).

"Though the words of the clause are prohibitory, they contain a necessary implication of a positive right, the right of every person to an equality before every law, the right to be free from any discriminations as to legal rights or duties a State may seek to make between him and other persons." *State v. Mitchell,* 97 Me. 66, 70 (1902).

"In a word, discrimination as to legal rights and duties is forbidden. All men under the same conditions have the same rights. Diversity in legislation to meet diversities in conditions is permissible. But if in legislative regulations for different localities, classes and conditions are made to differ, in order to be valid, these differentiations or classifications must be reasonable and based upon real differences in the situation, condition or tendencies of things. Arbitrary classification of such matters is forbidden by the Consitution. If there be no real difference between the localities, or business, or occupation, or property, the State cannot make one in order to favor some persons over others." *State v. Latham,* 115 Me. 176 (1916).

"If this Act is to be declared void, it must be because it is so manifestly in

violation of the Constitution as to leave no room for reasonable doubt. (citation omitted). 'The Constitutionality of a law is to be presumed until the contrary is shown beyond a reasonable doubt.' (citation omitted) 'But it may be the duty of the Court to pronounce invalid an act which violates an express mandate of the constitution even if the act is expedient and has been determined by the legislature to be necessary.' (citation omitted)

"The legislature can not dispense with a general law for particular cases. (citation omitted) It has no power to exempt any particular person or corporation from the operation of the general law, statutory or common. (citation omitted)

" 'It is manifestly contrary to the first principles of civil liberty and natural justice and to the spirit of our constitution and laws that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances, or that anyone should be subjected to losses, damages, suits or actions, from which all others in like circumstances are exempted.' (citation omitted)

. . . .

"A proper classification must embrace all who naturally belong to the class, or who possess a common disability, attribute or qualification, and there must be some natural and substantial difference germane to the subject and purposes of the legislation between those within the class included and those whom it leaves untouched." *In Re Milo Water Company,* 128 Me. 531, 535-536 (1930).

The most recent Maine case involving special treatment in both tax and regulatory matters is *A. H. S. vs. Mahoney,* 161 Me. 391 (1965). It was there argued that the legislative permission, through private and special act, granting the plaintiff insurance company tax exempt status with relative freedom from statutory supervision was a denial of equal protection to other insurance companies selling the same protection. The court held:

"The tax free and relatively unsupervised competition which plaintiff purports to supply in the health and accident insurance field is inconsistent without system of free enterprise, violates the principles established in Maine judicature and results in unequal protection of the laws." op. cit., 413.

Pertinent parts of the court's reasoning is set forth below:

"The phrase 'equal protection of the laws' has not been precisely defined. In fact, the phrase is not susceptible of exact delimination, nor can the boundaries of the protection afforded thereby be automatically or rigidly fixed. In other words, no rule as to what may be regarded as a denial of the equal protection of the laws which will cover every case can be formulated. . . . (E)ach case must be decided as it arises." 16 Am. Jur., (2nd) Constitutional Law § 486.

"Unquestionably the legislature is empowered to establish regulations of a business in which the interest of the public is involved."

"The general rule that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by constitutional provisions is subject to limitation to the extent that it does not permit discriminations by which persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions." 16 Am. Jur., *Constitutional Law* § 518.

"The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the

enforcement of the laws." *Soon Hing v. Crowley,* 113 U.S., 703, 709 (1884), as quoted and followed in *Dirken v. Great Northern Paper Company,* 110 Me. 374, 386, 86 A. 320.

". . . (D)iscrimination, to be constitutional, must be based upon some reasonable ground, – some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection. . . . It must be reasonable and based upon real differences in the situation, condition or tendencies of things." *State v. Leavitt,* 105 Me. 76, 84, 72 A. 875.

The problem is one of classification.

Consistently with the realization that each case must be decided upon its merits, a multivariety of decisions pro and con exist in the federal court system, citation of which will serve no purpose. Op. cit., 409, 410.

With these authorities as background, an analysis of the specific problem should be commenced by a look at classification. There is no attempt at classification. The subject of the special legislation is three private corporations and the attempt is to give each a special tax privilege. No public purpose is suggested in granting the tax exemption. See *Opinion of the Justices,* 161 Me. 185, 206 (1965). There is discrimination in favor of private corporations by arbitrary selection in violation of both the Maine and Federal constitutions.

To strike down the special tax treatment is to subject the credit unions to the general laws. By so doing, they are liable for sales and use tax as are other credit unions. No exemption exists in the sales tax law for credit unions.

Subjection to taxation is based upon the language of 9 M.R.S.A. § 2762, supra and the exemption therein granted must be construed strictly. *Town of Owls Head v. Dodge,* 151 Me 473 (1956), *Green Acre Baha'I Institute v. Town of Eliot,* 150 Me. 350 (1955); *Town of Orono v. S.A.E. Society,* 105 Me. 214 (1909). That exemption is limited to taxation of shares. The sales and use tax is a tax on the sale of property, or the use of property purchased, based upon the purchase price.

The Telephone Workers Credit Union, Railroad Workers Credit Union and Government Employees Credit Union are therefore subject to the Sales and Use Tax Law.

JAMES M. COHEN
Assistant Attorney General

May 26, 1969
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: Property Taxation of Privately Owned Railroad Tank Cars

SYLLABUS:

A MUNICIPALITY MAY ASSESS PERSONAL PROPERTY TAXES UPON RAILROAD TANK CARS USED AND EMPLOYED IN THE MUNICIPALITY ALTHOUGH ENGAGED IN INTERSTATE COMMERCE. AN ADMINISTRATIVE METHOD OF DETERMINING THE JUST VALUE OF SUCH PROPERTY IS PROPER SO LONG AS IT IS FAIR AND REASONABLE AND AFFORDS EQUAL TREATMENT.

FACTS:

Foreign corporations, which are not railroads, own or lease railroad tank cars used by them to carry liquids from outside the state to manufacturing and storage plants located within a municipality of the State of Maine. The cars remain at the plant only so long as it is necessary to remove the contents. Thereupon they leave the State. An average of two cars a week arrive at the respective plants on a regular schedule.

QUESTIONS:

1. May a municipality assess a personal property tax upon railroad tank cars used and employed in the municipality although engaged in interstate commerce?
2. If the railroad tank cars are subject to personal property taxation, what is a proper method of determining the amount of tax?

ANSWERS:

1. Yes.
2. Any administrative method which is fair and reasonable and which affords equal treatment is proper.

REASONS:

1. The State of Maine imposes personal property taxes pursuant to the following statutory provisions:

> "Personal property for the purposes of taxation includes all tangible goods and chattels. . . ." *36 M.R.S.A. § 601.*
>
> "All personal property within or without the State, except in cases enumerated in section 603, shall be taxed to the owner in the place where he resides." *36 M.R.S.A. § 602.*
>
> "Personal property which is within the State and owned by persons residing out of the State shall be taxed either to the owner, or to the person having the same in possession, or to the person owning or occupying any store, storehouse, shop, mill, wharf, landing, shipyard or other place therein where such property is." *36 M.R.S.A. § 603(3).*

Since the property in question is owned or leased by nonresidents it is taxable to the owners or lessees where the property is located.

The Supreme Court of the United States has often addressed itself to the question whether such rolling stock engaged in interstate commerce and used and employed in a State is a proper subject of property taxation. For example, in *Pullman's Car Co. v. Pennsylvania,* 141 U.S. 18, the court stated the following:

> "No general principals of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders. . . .
>
> "For the purposes of taxation, as have been repeatedly affirmed by this Court, personal property may be separated from its owner; and he may be taxed on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax. . . .
>
> "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its

jurisdiction."

In *American Refrigerator Transit Co. v. Hall,* 174 U.S. 70 (1899), the Supreme Court upheld a property tax assessed by the State of Colorado against railroad cars of an Illinois Corporation which were used on trains throughout the United States and which passed through Colorado. At page 81 of its opinion the court stated:

> "It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were consistantly changing, according to the exigencies of the business.
>
> . . .

To the argument that a property tax was a burden on interstate commerce in *Braniff Airways v. Nebraska Board,* 347 U.S. 590 (1953) the court stated at page 597: "We have frequently reiterated that the Commerce Clause does not immunize interstate instrumentalities from all state taxation, but that such commerce may be required to pay a nondiscriminatory share of the tax burden."

To an argument that the tax violated the due process clause the court in the same case quoted *Ott v. Mississippi Valley Barge Line Co.,* 366 U.S. 169, 174: " 'So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state.' "

The most recent approval of such taxation was expressed in *Norfolk & W. Ry. Co. v. Mo. State Tax Commission,* 390 U.S. 317 (1968).

There is no constitutional or statutory objection to the imposition of a personal property tax upon railroad tank cars owned or leased by foreign corporations and used during the taxing year in a taxing district.

2. An important question is the determination of the nature, amount and value of the property subject to be taxed. By virtue of 36 M.R.S.A. § 706 taxpayers are required to furnish assessors with lists of property subject to taxation. This applies to nonresident taxpayers as well as resident taxpayers.

Pursuant to 36 M.R.S.A. § 708 assessors are required to ascertain *"as nearly as may be* the nature, amount and value as of the first day of each April of the . . . property subject to be taxed". (Emphasis supplied.) Since not all railroad tank cars passing through this State would have a situs here it would become necessary to determine which portion of these cars could properly be subject to tax.

Maine law requires a determination of the nature, amount and value of property subject to tax, "as nearly as may be". However, the legislature did not set forth the procedure for the determination.

In order that property moving in interstate commerce and subject to taxation by the State of Maine, receive its fair share of the burdens of taxation there must be an assessment. The assessment must be of such a nature that it complies with the Constitution of the United States, the decisions of the Supreme Court, the Constitution of the State of Maine, and the Statutes of the State of Maine.

Since it is difficult to determine the nature, amount and value of property such as railroad tank cars, the Supreme Court has stated that "the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used

and employed." *American Refrigerator Transit Co. v. Hall,* 174 U.S. 70, 81 (1899). Later the Supreme Court said: "When individual items of rolling stock are not continuously the same but are constantly changing as the nature of their use requires, the Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within the limits." *Johnson Oil Co. v. Oklahoma,* 290 U.S. 158 (1933).

The determination of the nature, amount and value of property subject to taxation is properly an administrative function. This is evidenced from the legislative use of the language "as nearly as may be" in defining the duty of the assessors.

The State of Utah requires taxpayers to furnish lists of property owned by them in the State. There is no statutory procedure for determining the average number of rolling stock units used in the State, although the Supreme Court of the United States has upheld this procedure for the taxation of railroad cars in *Union Refrigerator Transit Co. v. Lynch,* 177 U.S. 149 (1900), in which case Utah imposed a tax upon railroad cars owned by a Kentucky Corporation which maintained no office in Utah and which railroad cars passed through Utah in interstate commerce.

The Utah Court in *Crystal Car Line v. State Tax Commission,* 174 P. 2d 984 addressed itself to the administrative determination of the amount of property subject to taxation:

> "The situs of personal property for taxation purposes is established by the presence, actual or constructive, within the taxing jurisdiction where it receives the protection of said jurisdiction.
>
> . . . .
>
> "Rolling stock is personal property but because of the very nature of its use the individual items are constantly changing and ordinarily do not remain in any particular jurisdiction long enough to create a taxable situs for the individual item for general property tax purposes, yet where there are always present and being used within the taxing jurisdiction a certain number of these items a situs is established for such taxation purposes, and the value of the property is arrived at by determining the average number of such items which are present in the State.
>
> . . . .
>
> "Our constitutional provision that the legislature shall provide by law a uniform and equal rate of taxation on all tangible property and 'shall prescribe by law such regulation as shall secure a just valuation for taxation of such property' does not mean that the legislature must prescribe a formula which must be used by the tax commission in arriving at its assessments. The ascertainment of the amount of property to be taxed and its value is properly an administrative function. It is sufficient if the legislature provides the property shall be taxed and fixes the rate at which it may be taxed."

Similarly, the Texas Supreme Court has upheld an administrative determination of a formula for assessing the rolling stock of a motor bus corporation operating in interstate commerce. *Greyhound Lines, Inc. v. Board of Equalization,* 419 S.W. 2d 345 (Texas, 1967).

The most recent expression of approval by the U.S. Supreme Court of the use of formulas in determining valuation is found in *Norfolk & W. Ry Co v. Mo. State Tax Com'n.*

> "Established principles are not lacking in this much discussed area of the law. It is of course settled that a state may impose a property tax upon its fair share of an interstate transportation enterprise. That fair share may be regarded as the

value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing State, including a portion of the intangible, or going-concern, value of the enterprise. The value may be ascertained by reference to the total system of which the interstate assets are a part. As the Court has stated the rule, the tax may be made to cover the enhanced value which comes to the (tangible) property in the State through its organic relation to the (interstate) system. *Pullman Co. v. Richardson,* 261 U.S. 330, 338, 43 S. Ct. 366, 368, 67 L. Ed. 682 (1923). Going-concern value, of course, is an elusive concept not susceptible of exact measurement. As a consequence, the states have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders. Such formulas usually involve a determination of the percentage of the taxpayer's tangible assets situated in the taxing State and the application of this percentage to a figure representing the total going-concern value of the enterprise. A number of such formulas have been sustained by the Court, even though it could not be demonstrated that the results they yielded were precise evaluations of assets located within the taxing State." *Supra,* at 323.

Since the determination of the nature, amount and value of property subject to taxation is properly an administrative function, it might well be within the jurisdiction of the State Tax Assessor to provide assessing officials with a procedure for determining the amount of such property to be considered located in the State for taxing purposes. This is said with reference to 36 M.R.S.A. § 201 which gives the State Tax Assessor "general supervision over the administration of the assessment and taxation laws of the State and over local assessors and all other assessing officers in the performance of their duties, to the end that all property shall be assessed at the just value thereof in complaince with the laws of the State."

The method used to determine the amount of property located within the taxing district, and the just value of such property must be fair and reasonable; with equal treatment being given.

JAMES M. COHEN
Assistant Attorney General

June 4, 1969
Executive

Kenneth M. Curtis, Governor

Appointment of a faculty member of the University of Maine to membership on the board of trustees of the University.

SYLLABUS:

A person may not serve in the dual capacity of faculty member and trustee of the University of Maine.

QUESTION:

May a faculty member of the University of Maine serve as a member of the Board of Trustees of the University?

ANSWER:

No.

OPINION:

The creation of the so-called "super university system" by the enactment of P.L. 1967, c. 229, did not completely revise the charter of the University of Maine. The duties of the Trustees as delineated in Chapter 532 of the Private and Special Laws of 1865, which Act created the University, remain largely unchanged.

P. & S., 1865, c. 532, section 8 reads in part as follows:

> "Sec. 8. The trustees shall appoint such directors, professors, lecturers and teachers in the college, and employ such other persons therein from time to time, as the means at their command may permit for the accomplishment of the objects enumerated and described in the fourth section of the act of congress. *Every officer and every person employed shall hold his office or employment at the pleasure of the trustees.* They shall, as soon as may be, arrange and make known the several courses of instruction which they will undertake at the outset of the college, and shall enlarge and improve the same whenever practicable, subject to the limitations prescribed by congress. . . ." (emphasis supplied)

It is readily apparent, without underestimating the importance of the role of the teacher in the university system, that a professor is an agent or an employee whose services may be dispensed with by the trustees at anytime when the interests of the institution so demand.

Were a professor to be appointed to the Board of Trustees, a clear conflict of interest, or incompatibility of office, would exist. Generally speaking, two offices are incompatible when the holder cannot in every instance discharge the duties of each. For a more detailed discussion, see *Howard v. Harrington,* 114 Me. 443, 96 A. 769 (1916).

Both the statutory language which creates the office of trustee and describes the duties of said office, and well established common law doctrine, compel us to answer your inquiry in the negative.

PHILLIP M. KILMISTER
Assistant Attorney General

June 6, 1969

The Honorable Kenneth M. Curtis
Governor of Maine
State House
Augusta, Maine

Dear Governor Curtis:

A question has arisen relative to the eligibility of Elmer W. Campbell for the office of Bank Commissioner. Mr. Campbell has retired from the First-Manufacturers National Bank of Lewiston and Auburn, Maine. The bank has a fully vested employee pension plan qualified under section 401 (a) of the Internal Revenue Code and administered by First Bank's Trust Department under a Declaration of Trust dated June 5, 1964. Mr. Campbell was employed by the bank for more than 40 years and is entitled to pension benefits under the plan. He will receive pension payments from this plan.

Our statutes, section 1 of Title 9 in the third paragraph provides:

"During his term of office the commissioner . . . shall not be an officer, director . . . in any financial institution or National bank . . . or *receive, directly or indirectly, any payment or gratuity from any such institution* . . . ." (Emphasis supplied)

The question is therefore raised as to whether or not the receipt of the pension from the First-Manufacturers National Bank of Lewiston and Auburn, Maine is a payment or gratuity from a National bank.

We answer in the negative. The language of the statute contemplates a payment or gratuity from a bank for a current service being rendered to that institution. A pension is a payment for past services rendered and a recognition of long years of service. It is not a payment or gratuity for a present service and, therefore, does not bring the recipient within the prohibitions of the statute.

Respectfully,

GEORGE C. WEST
Deputy Attorney General

June 17, 1969
Treasury

Richard L. Bailey, Accountant

Intra-departmental Transfer of Funds

SYLLABUS:

A transfer of funds from one account to another within a department may be made by the Governor and Council when recommended by the department head and the State Budget Officer.

FACTS:

The office of the Treasurer of State has in its Debt Retirement Appropriation (Account) some surplus funds. The Interest on Bonded Debt Appropriation (Account) has not sufficient funds to meet interest payments which will become due on some temporary loans.

QUESTION:

May funds be transferred from the Debt Retirement Appropriation (Account) to the Interest on Bonded Debt Appropriation (Account) both being within the office of the Treasurer of State?

ANSWER:

Yes.

OPINION:

In general, the question was answered by the opinion of the Attorney General dated April 4, 1955, copy of which is attached hereto. The statute cited is now 5 M.R.S.A. § 1585 and is unchanged other than the addition of the words "or agency" after the word "department" in three places.

By 5 M.R.S.A. § 150, the Legislature authorizes the making of temporary loans. It provides a general appropriation of $10,000,000 for payment of temporary loans. Loans not only must be repaid, but the cost of the use of the money in the form of interest must be paid. If there is not sufficient money in the account set up to pay interest, then money may be transferred from another departmental account in accordance with 5 M.R.S.A. § 1585.

GEORGE C. WEST
Deputy Attorney General

July 17, 1969
Park and Recreation Commission

Frederick M. Bartlett

School Administrative Districts as Recipients of Land and Water Conservation Funds

SYLLABUS:

School Administrative Districts may not enter into agreements with the State of Maine for the acquisition and/or development of public outdoor recreational facilities with financial assistance from the Land and Water Conservation Fund.

FACTS:

The Maine State Park and Recreation Commission, on behalf of the State of Maine, is responsible for the administration of the Land and Water Conservation Fund program which provides, inter alia, for a 50% reimbursement from the federal government for the acquisition and development of public outdoor recreational facilities. Under the provisions of the Act governing this program, public agencies or political subdivisions of the State are eligible to participate. You have provided this office with a project agreement to be used by the State of Maine and political subdivisions of this State which incorporates provisions of compliance and responsibility of the State in accordance with the Land and Water Conservation Fund Act of 1965, 78 Stat. 897 (1964) and provides that the political subdivision (called the Recipient) is also bound by the provisions of said Land and Water Conservation Act.

QUESTION:

Can a School Administrative District contract with or enter into with the State of Maine for the acquisition and/or development of public outdoor recreational facilities?

ANSWER:

No.

OPINION:

For purposes of the Land and Water Conservation Fund Act a public agency, as well as a political subdivision, may be eligible to receive federal land and water conservation funds from a State. The Bureau of Outdoor Recreation, U.S. Department of the Interior, defines a public agency as follows:

> "PUBLIC AGENCY: Any non-private entity which serves a governmental purpose. The term includes but is not limited to State agencies, political subdivisions, and public authorities and commissions having governmental functions. For purposes of this manual, it does not include agencies of the Federal Government." Bureau of Outdoor Recreation Manual. Grants-in-Aid Series. Part 600. General. Chapter 2 Definitions. 600.2.1 (Con.)

Thus, the project agreement by and between the State of Maine and one of its political subdivisions could be changed so that a public agency instead of a political subdivision was a party to the project agreement. It does not follow, however, that all public agencies could enter into such an agreement with the State of Maine, and more specifically a School Administrative District, even though it falls within the Bureau of Outdoor Recreation's definition of a public agency, could not enter into a Land and Water Conservation Fund project agreement.

School Administrative Districts are established by Maine statute for educational purposes. Our Maine Legislature has set forth its policy in permitting the establishment of School Administrative Districts by the following statutory language:

> "Declaration of policy. It is declared to be the policy of the State to encourage the development of school administrative units of sufficient size to provide a more equalized educational opportunity for pupils, to establish satisfactory school programs and to achieve a greater uniformity of school tax rates among the School Administrative Districts and a more effective use of the public funds expended for the support of public schools." 20 M.R.S.A. § 211.

The provisions of the Maine Revised Statutes relating to School Administrative Districts do not expressly, or by implication, authorize School Administrative Districts to operate and maintain outdoor recreational facilities for the general public.

JEROME S. MATUS
Assistant Attorney General

July 30, 1969

To: Ernest H. Johnson, State Tax Assessor, Bureau of Taxation

Subject: Corporate Franchise Tax, Title 36 M.R.S.A. Sections 2401 Through 2407

SYLLABUS:

LOAN COMPANIES AND INDUSTRIAL BANKS ORGANIZED PURSUANT TO TITLE 9 ARE SUBJECT TO CORPORATE FRANCHISE TAX.

FACTS:

Title 9 of the Revised Statutes permits the organization of certain corporations with fixed capital which engage in banking and financial business, such as trust companies,

industrial banks and loan companies.

A corporate franchise tax is imposed upon "every corporation incorporated under the laws of this State, having a fixed capital . . . ." 36 M.R.S.A. §2401. "The State Tax Assessor shall . . . assess the tax . . . upon the authorized capital stock . . ." 36 M.R.S.A. § 2402. The tax is determined with respect to the amount of the capitalization.

QUESTION:

Whether financial institutions organized as corporations with capital stock under Title 9 of the Revised Statutes are subject to the corporate franchise tax?

ANSWER:

Yes, (except trust companies and national banks).

REASONS:

Certain banking and financial institutions organized under Title 9 are not subject to the corporate franchise tax because they are corporations without fixed capital. These are savings banks, savings and loan associations, and credit unions.

Trust companies and national banks are exempt from the corporate franchise tax as a result of 36 M.R.S.A. §4752 and *Opinion of the Attorney General,* August 17, 1966. These institutions pay a bank stock tax.

Taxation is the rule and exemption the exception, *Inhabitants of Town of Owls Head v. Dodge,* 151 Me. 473; *In re Camden Shipbuilding Co.,* 227 F. Supp. 751; and no specific exemption exists in the statutes with respect to corporations with fixed capital organized under Title 9. Corporations having a fixed capital are subject to the franchise tax imposed by 36 M.R.S.A. § §2401, 2402. Therefore, industrial banks and loan companies are liable for the corporate franchise tax in the same manner as any other corporation with fixed capital.

JAMES M. COHEN
Assistant Attorney General

August 5, 1969
Mental Health and Corrections
(Bureau of Mental Health)

William E. Schumacher, M.D., Director

Construction of Aroostook Mental Retardation Facility

SYLLABUS:

Under P&SL 1967, c. 222, the Department of Mental Health and Corrections has responsibility for the construction of the Aroostook Mental Retardation Facility, and can not share such responsibility with, or delegate it to, a private agency. Land upon which such facility is built shall be owned by the State of Maine and not leased.

FACTS:

The 103rd Legislature by P&SL 1967, c. 222, ratified by the voters, authorized the

Department of Mental Health and Corrections as follows:

"Sec. 1. Residential facility for mentally retarded. The Department of Mental Health and Corrections shall construct a residential facility for retarded children in Aroostook County, utilizing any available building funds and matching federal funds. The cost of such construction, including any expense incurred in financing thereof, shall be taken and appropriated from the proceeds of bonds issued under authority of this Act. Expenses of financing shall include the interest payments required on the bonds for the purposes of such construction."

The Commissioner of Mental Health and Corrections and the Director of Mental Health have met with representatives of the Central Aroostook Association for the Retarded, and have discussed the responsibility of the Department of Mental Health and Corrections with respect to construction of the Aroostook Facility for the Retarded and whether such facility may be constructed upon land leased by the Department of Mental Health and Corrections, or upon land owned by the Central Aroostook Association, also under a lease arrangement.

QUESTIONS:

1. Can the Department make arrangements with the Central Aroostook Association for the Retarded to have that association construct the building in accordance with a mutually agreeable plan for construction?

2. May the Department of Mental Health and Corrections lease land for this construction, or utilize land which is owned by the Central Aroostook Association, and construct on that leased land?

ANSWERS:

1. No.
2. No.

REASONS:

The Legislature has clearly vested the Department of Mental Health and Corrections, only, with authority to construct the facility in question. No authorization is found in the Act for the sharing or delegating of such responsibility. Further, the Bureau of Public Improvements, under the General Law, has the responsibility with respect to supervision of construction of State buildings, and any contracts with respect to the construction of the building, except contracts for professional, architectural and engineering services are required to be put out to competitive bids under Title 5, M.R.S.A. § 1743, which mandatory element of construction control would not be adhered to, where the Department of Mental Health and Corrections to permit a private agency to build the building using State funds. We are, therefore, of the opinion that the Department of Mental Health and Corrections, under the Act and within the framework of the General Law, relating to State building construction, has the responsibility for constructing the Aroostook Facility for the Mentally Retarded and can not share with, or delegate to a private agency, such responsibility.

We find no authority for the construction of a State building on land other than land to which the State has title. Further, we find that the Aroostook Facility for the Mentally Retarded will come under the control of the Department of Mental Health and

Corrections, including its grounds and property, under the following language of Title 34, M.R.S.A.§1:

"The Department of Mental Health and Corrections . . . shall have general supervision, management and control of the . . . grounds, buildings and property, . . . of all of the following state institutions . . . and such other charitable and correctional state institutions as may be created from time to time . . ."

We find implicit in the above language the legislative intent that all property upon which institutions, under the Department of Mental Health and Corrections, are located be property owned by the State, since such ownership must exist in order for the Legislature to delegate the supervision and control of such property, clearly expressed in the Statute. Were the building in question to be built upon leased land any control which the department might have over the grounds and property would arise from the lease. Such contractually determined control was not intended by the Legislature.

COURTLAND D. PERRY
Assistant Attorney General

August 6, 1969
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

SUBJECT: Insurance Premium Taxes

SYLLABUS:

THE RECEIPT OF PREMIUMS OUT OF STATE BY A FOREIGN INSURANCE COMPANY ON RISKS LOCATED IN MAINE, WHICH COMPANY HAS WITHDRAWN FROM THIS STATE, CONSTITUTES THE DOING OF BUSINESS PURSUANT TO 36 M.R.S.A. § 2513 SO THAT AN INSURANCE PREMIUM TAX IS PAYABLE BY SUCH COMPANY.

FACTS:

A foreign insurance company no longer solicits new insurance or collects premiums in this State. Its license, issued by the Insurance Department and which authorized the company to transact business in Maine, expired on July 1, 1968 and it has not been renewed.

The company has no offices or agents in the State of Maine. However, the company continues to collect and receive premiums out-of-state upon policies which were written prior to its withdrawal from the State of Maine. It is assumed that the company sends premium reminder notices to the insureds on a regular basis. Also, it is assumed that the company will, from time to time, be compelled to investigate claims pursuant to policies issued to insureds residing in Maine and that litigation in Maine courts, in connection with these policies, may arise from time to time.

The insurance premium tax is administered under sections 2511 through 2522 of Title 36 of the Revised Statutes. Imposition of the tax is provided in 36 M.R.S.A. §2513:

"Every insurance company or association which *does business or collects premiums* or assessments including annuity considerations *in the State* . . . shall, for the privilege of doing business in the State, and in addition to any other taxes imposed for such privilege annually pay a tax upon all gross direct premiums

including annuity considerations, whether in cash or otherwise, on contracts written on risks located or resident in the State for insurance of life, annuity, fire, casualty and other risks at the rate of 2% a year. (Emphasis supplied).

QUESTION:

Does the receipt of premiums out of state by a foreign insurance company on risks located in Maine, which company has withdrawn from this State, constitute the doing of business so that an insurance premium tax is payable to the State?

ANSWER:

Yes.

REASONS:

Section 2513 levies a premium tax upon any insurance company which "does business or collects premiums . . . in the State . . . for the privilege of doing business in the State." This is a privilege tax. For the assessment to be valid the insurance company must be doing business in the State or collecting premiums in the State.

If the company is doing business in the State of Maine, it may be subjected to taxation. The question for decision becomes whether the receipt of premiums outside the State of Maine by a foreign insurance company, on risks located in Maine, which company has withdrawn from this State, constitutes the doing of business.

The Supreme Court of California in *People v. United National Life Insurance Co., et als.* 58 Cal. Rptr. 599 (1967), in part dealt with the question of whether or not a mail order insurance company, for purposes of regulation, was doing business within the State of California. The court stated at page 690:

> "In all instances payment of premiums is made by California residents from funds or bank accounts located in California. It is clear that any claims made under the policies will most likely be investigated in this state and that any litigation in connection with the policies will undoubtedly be commenced in California courts. It is also forseeable that should defendants for any reason fail to perform their obligations in accordance with the policies, California might be called upon to provide assistance for the persons within its borders who were intended to be financially assisted by the benefits under the policies.
>
> * * *
>
> "The main aspects of their insurance transactions are in this State; and to say that they are not doing business here is to completely ignore the facts of life and reality."

The language of the Court in the decision cited above is relevant to the facts and the question involved here. Not only did the company which withdrew from Maine, at one time actively solicit insurance by registered agents in Maine, but it is assumed that it now continues to send premium reminder notices to the insureds, and if necessary, the company will investigate claims and be involved, either as plaintiff or defendant, in litigation in Maine courts in connection with these policies.

There are here the requisite minimal contacts with the State of Maine which constitute the "doing of business" by a company which has withdrawn from the State, but continues to collect premiums from insureds located in this State. The *Opinion of the Attorney General,* March 3, 1969, held that, certain minimal contacts such as

solicitation, offer and acceptance and the payment of premiums by mail, without more, constituted the "doing of business" for the purpose of jurisdiction to regulate.

Further, the *Opinion of the Attorney General,* May 19, 1969, which concerned the effect of 36 M.R.S.A. §2513 as to the taxability of mail order insurance companies, held:

> "When the insured risk is located or resident in Maine and there are some business contacts with this state the insurance company is subject to the taxing jurisdiction of Maine."

Surely, for purposes of the insurance premium tax, this company is maintaining "some business contacts with this State".

We are aware of the United States Supreme Court's decision in *Provident Savings Assn. v. Kentucky,* 239 U.S. 103 (1915) where it was held that, on similar facts, that the continued collection of premiums by an insurance company, after withdrawal from the State, did not constitute the "doing of business." It is believed that the United States Supreme Court, if presented the question raised by this opinion today would follow and expand upon the California Court's reasoning in *People v. United National Life Insurance Co.,* supra. The findings of the California Court were appealed to the Supreme Court of the United States. It was dismissed for "want of a substantial Federal Question." *United National Life Insurance Company, et als. v. California,* 389 U.S. 330 (December 11, 1967).

It should be noted that pursuant to Title 24-A M.R.S.A. §405 of the recently enacted Maine Insurance Code, to be effective January 1, 1970 insurance companies, which formerly held Certificates of Authority and which continue to collect new premiums resulting from their former authorized operations in Maine, must obtain a Certificate of Authority pursuant to §404. Such companies will be specifically subject to regulation by the State.

It is not necessary to here decide whether or not this company collects premiums "in the State", as a basis for the imposition of a premium tax, inasmuch as this company is "doing business" in Maine; and it is this latter ground upon which this opinion is rested.

WENDELL R. DAVIDSON
Assistant Attorney General

August 11, 1969
Inland Fisheries and Game

Maynard F. Marsh, Chief Warden

Hunting, etc. by Indians, P.L. 1969, Ch. 338

SYLLABUS:

An Indian may not, under P.L. 1969, Ch. 338, take a deer on reservation lands and sell it.

FACTS:

P.L., 1969, Chapter 338 amended 12 M.R.S.A. §2301, sub- §3, by adding a new paragraph A which provides that nothing in the fish and game laws "shall be construed to encroach upon the right of said Indians to take wild life for their own sustenance on their own reservation lands."

QUESTION:

Does this law mean that an Indian, on reservation lands, may take a deer, sell it, and use the money to purchase food or clothing?

ANSWER:

No.

OPINION:

The answer to this question depends upon the meaning of the word "sustenance" in the context of the statute, having in mind the intent of the Legislature.

"Sustenance" is defined in the New Standard Dictionary as follows:

"1. The act or process of sustaining; especially, maintenance of life or health; subsistence.

2. That which sustains; especially, that which supports life; food; as, a day's sustenance."

In Webster's International Dictionary (2nd Ed.) it is defined as:

"1. Means of support, maintenance or subsistence; a living; now, more often, food; provisions; also, nourishment, as to wring a scanty sustenance from the soil; . . . ."

In *Justice v. State* (Ga. 1902) 42 S.E. 1013, the only decided case defining "sustenance" which has been found, it was held that as used in a statute declaring that whoever shall "deprive of necessary sustenance shall be guilty of misdemeanor" it means "that necessary food and drink which is sufficient to support life and maintain health" and not to include medicine.

Giving consideration to these definitions, and to the fact that the right of Indians to take wild life for their own sustenance applies only on their own reservations, it is our opinion that it was not the intent of the Legislature to allow an Indian to sell such wild life and use the proceeds for buying food or clothing. The intent of the Legislature was to allow an Indian to take deer on his own reservation solely to feed himself and his family.

LEON V. WALKER, JR.
Assistant Attorney General

August 14, 1969
Park and Recreation Commission

Eugene P. Hart, Supervisor

Fee for copy of Lake Chart prepared under 38 M.R.S.A. §323

SYLLABUS:

38 M.R.S.A. §323 does not authorize the Director of the State Park and Recreation Commission to prepare and sell a navigational chart showing the navigational aids placed in a certain lake in accordance therewith, since there is no express statutory authority for charging a fee for such a publication.

FACTS:

The Division of Waterways, Park and Recreation Commission, has established marking systems on several lakes of the State, including Sebago Lake, and has prepared a navigational chart of Sebago as a service to the boating public. The nature of this type of publication, and its overall cost, precludes free distribution. A fee of $.25 to cover the cost of printing and postage is proposed.

QUESTION:

Is 38 M.R.S.A. § 323 sufficient authority for charging a fee for this service?

ANSWER:

No.

OPINION:

A department of the State Government may not prepare and sell a publication to the public without express statutory authority to do so. See Attorney General Opinion dated July 18, 1968.

38 M.R.S.A. §323, as enacted by P.L., 1963, Ch. 367, provides that the Director of the Park and Recreation Commission may charge reasonable fees for the services provided in connection with boating facilities in the waters of the State. By P.L. 1965, Ch. 173, a new paragraph was added to § 323 providing that the Director may make rules for the uniform marking of the water areas of the State through placement of aids to navigation and regulatory markers.

The authority to make rules for such marking includes the authority to prepare and distribute such rules to the public. Nowhere in the statute, however, does there appear the authority to print and sell any publications, nor can any such authority be inferred. The "services" for which the Director is authorized to charge reasonable fees, as provided in the first paragraph of §323 would include launching ramps, parking sites and access roads as provided in § 321 and the navigational markers provided for in § 321 but not preparation of publications such as the proposed navigational chart.

LEON V. WALKER, JR.
Assistant Attorney General

August 15, 1969
Legislative Finance

William A. Garside, Director

SYLLABUS:

The setting of salaries of Legislative officers is a matter solely for the Legislature. Whether there is a repugnant conflict between a Senate Order and a Joint Order is a question of fact, not of law.

FACTS:

The Legislature has a number of employees. Some are employed by the House and some by the Senate. A Joint Order which reads:

"ORDERED, the House concurring, that there be paid to the officers of the Senate and House of Representatives as advance on account of compensation, amounts included in forthnightly lists, certified to the State Controller by the Secretary of the Senate and the Clerk of the House, respectively, and that the final payrolls of such officers at the end of the session bear the approval of the Joint Standing Committee on Appropriations and Financial Affairs."

was passed in each house on January 2, 1969.

During the session some members of the Senate became concerned because some employees in that body received less pay than their counterparts in the House of Representatives.

On July 2, 1969, the Senate passed the following Senate Order:

"ORDERED, that the salaries of the officers of the Senate be adjusted to a level comparable to those paid to officers holding comparable positions in the House of Representatives, effective from the beginning of the regular session."

QUESTIONS:

1. Is the enclosed Senate Order legal under the legislative procedure presently in effect?
2. Does the Appropriation Committee have the right to approve or disapprove retroactive pay for some members of the Senate staff?

ANSWERS:

1. See OPINION.
2. See OPINION.

OPINION:

The Joint Order dated January 2, 1969 expresses the Legislative opinion or will as to the method of payment of the compensation of its officers and employees. It does not state directly or indirectly what the compensation shall be nor how it is determined.

The Senate Order of July 1, 1969 attempts to set a rather vague and uncertain level of salaries, retrospectively, for officers of the Senate. Note the language "a level *comparable* to those paid to officers holding *comparable* positions in the House of Representatives". (Emphasis supplied.) What is "comparable" is a question of fact. This office cannot provide an answer.

We have no knowledge as to the method used by the Legislature to determine salaries or compensation of officers or employees of the two Houses. We cannot, therefore, answer the first question as to the legality of the Senate Order dated July 1, 1969.

Under the Joint Order dated January 2, 1969 the final payroll must be approved by the Joint Standing Committee on Appropriations and Financial Affairs. As stated above, we have no knowledge as to the method used by the Legislature to determine salaries or compensation of officers or employees of the two Houses. We cannot, therefore, advise as to the authority of the Joint Standing Committee on Appropriations and Financial Affairs to approve or disapprove the final payroll of the Senate staff.

Additionally, the determination of the salary of Legislative officers is a matter solely for the Legislature to decide. We cannot find any legal questions requiring an opinion from this office.

GEORGE C. WEST
Deputy Attorney General

September 12, 1969
State Planning Office

Franklin A. Milliken, Director
of Regional and Local Planning

Effect of Me. Public Laws 1969, ch. 382 on regional planning commissions

SYLLABUS:

Under Me. Public Laws 1969, ch. 382, a council of governments may assume the planning functions of a regional planning commission, to the exclusion of such commission, where the municipalities who are members of the commission vote to transfer all the assets, liabilities, rights and obligations of the commission to the council, and to dissolve the commission.

FACTS:

30 M.R.S.A. §4501-4504 enables municipalities which have planning boards to join regional planning commissions, and describes the membership, powers and duties of such commissions. Me. Public Laws 1969, ch. 382, effective October 1, 1969, affords municipalities the privilege of combining in yet another supra-municipal organization called a "council of governments".

One of the duties of the regional planning commission is to prepare a comprehensive regional plan. 30 M.R.S.A. §4504 (3) (A). Chapter 382 provides that a council of governments may establish a standing committee whose duty is, likewise, to prepare a comprehensive regional plan. Chapter 382 also provides that the member municipalities in a council of governments, who are also members of a regional planning commission, may transfer all the assets, liabilities, rights and obligations of the commission to the council, and dissolve the commission.

Counsel for the Department of Housing and Urban Development has made the following inquiry concerning the impact of chapter 382, which you have relayed to us:

QUESTION:

Does Me. Public Laws, ch. 382 authorize the assumption of a regional commission's planning function by a council of governments?

ANSWER:

Yes, if the municipalities who are members of the regional planning commission vote to transfer this function to the council and to dissolve the commission.

OPINION:

The answer to the question posed is evident from the face of the statute. Chapter 382 speaks for itself. It enables a council of governments to form a standing committee to prepare and maintain a comprehensive regional plan. Once this committee has been organized, it may then embark on its planning function. However, the mere creation of the committee does not automatically oust an existing regional planning commission of its statutory planning duties. It is conceivable that both a council of governments and a regional planning commission, under existing law and chapter 382 (when effective),

could co-exist and overlap in performing regional planning.

The only method under chapter 382 by which the council of governments can completely assume the planning functions of a regional planning commission, to the exclusion of the commission, is if the municipalities who are members of the commission vote to transfer all its assets, liabilities, rights and obligations to the council, and to dissolve the commission.

ROBERT G. FULLER, JR.
Assistant Attorney General

September 12, 1969
Labor and Industry

Madge E. Ames, Director,
Minimum Wage, Women & Child Labor

Deductions from Minimum Wage.

SYLLABUS:

The term "wages" as defined in Title 26 M.R.S.A. § 663, subsection 5 does not include compensation paid to an employee in any form other than legal tender of the United States, checks on banks convertible into cash on demand, or the reasonable cost to the employer who furnishes such employee board or lodging.

Further, expenses of the employer that are passed on to the employee cannot be deducted from wages of the employee if such deductions bring the total wages below the minimum level.

FACTS:

Title 26 M.R.S.A. § 663, subsection 5 provides as follows:

> "5. Wages. 'Wages' paid to any employee includes compensation paid to such employee in the form of legal tender of the United States, checks on banks convertible into cash on demand, and includes the reasonable cost to the employer who furnishes such employee board or lodging."

Title 26 M.R.S.A. § 664 provides for a minimum wage for all employees unless excluded therein or elsewhere.

The Department of Labor and Industry advises that the following situations are typical as to certain employers:

1. A restaurant requires kitchen workers to wear an apron and charges the employees $1.00 a day for use and laundering, deducting this from the wages.
2. A restaurant requires waitresses to wear uniforms, which they are required to buy from the employer, deducting this from wages.
3. A restaurant charges $1.50 a week for broken dishes and deducts this from the wages of all employees.
4. A gasoline service station deducts from the wages of its employees any losses incurred because credit card purchases turn out to be not bona fide, or from bad checks.
5. A gasoline service station and a restaurant deduct from the employees' wages any shortage which occurs in the cash register.

QUESTION:

Does the term "wages" as defined in Title 26 M.R.S.A. § 663, subsection 5 include compensation paid to an employee in any form other than legal tender of the United States, checks on banks convertible into cash on demand, or the reasonable cost to the employer who furnishes such employee board or lodging?

ANSWER:

No.

REASON:

A plain reading of the definition of "wages" set forth hereinabove clearly reveals that the term "wages" only includes compensation paid to an employee in the form of legal tender or checks convertible into cash with the one exception that the employer may include the reasonable cost for furnishing board or lodging to the employee.

It is significant that the five examples set forth above either directly or indirectly constitute expenses of the employer that are being passed on to the employee. Consequently, they cannot reasonably be held to be deductions at the request of the employee.

Where the employer computes the minimum wage and then proceeds to deduct from wages, items that are really expenses to the employer, he is doing indirectly what cannot legally be done directly. Deductions that merely pay the expenses of an employer, as in the examples set out above, cannot be deducted from the wages of the employee if such deductions bring the total wages below the minimum legal level.

HARRY N. STARBRANCH
Assistant Attorney General

September 16, 1969
Treasury

Dura S. Bradford, Deputy Treasurer

Legality of Negotiated Bond Issue

SYLLABUS:

Absent specific legislative action, a bond issue may be negotiated with the approval of the Governor and Executive Council for any term of years not exceeding that stated in the bond issue Act.

FACTS:

The 102nd Legislature at a Special Session proposed a bond issue in the amount of $1,500,000 to develop the Allagash Waterway. The bond issue was ratified by the people at a special election. During the intervening years most of the bonds have been issued until there is presently a balance of $250,000 not issued. The Act, P. & S. L. 1965 Chapter 277, places a limit of 5% on this bond issue. The present bond market is such that any bids for bonds would run over 6%.

The Treasurer of State has negotiated a sale of the $250,000 in bonds with a local bank which will buy them at 5% covering a period of 5 years.

QUESTION NO. 1:

May bonds be sold by negotiation without public bids?

QUESTION NO. 2:

May the balance of the Allagash Waterway bonds be sold with maturity dates within 5 years?

ANSWER NO. 1:

Yes.

ANSWER NO. 2:

Yes.

OPINION:

We note that P. & S. L. Chapter 277 in section 2, carries the usual language "The Treasurer of State is authorized, under the direction of the Maine State Park and Recreation Commission, with the approval of the Governor and Council to issue bonds from time to time . . . ." There is no language in section 2 which indicates that bonds must be sold by competitive bid.

We look at section 4 which states in part, "The Treasurer of State may negotiate the sale of such bonds by direction of the Maine State Park and Recreation Commission with the approval of the Governor and Council."

It must be understood that the legislature in enacting bills does not duplicate language unless it has some purpose. The first quotation from section 2 authorizes the issuance of bonds. The second quotation from section 4 authorizes the State Treasurer to "negotiate" the sale. It does not indicate in what way a negotiation must be carried on. It simply authorizes the Treasurer of State with the approval of Governor and Council to negotiate the sale of bonds. Therefore, we must conclude that if the Governor and Council approve a Council Order authorizing the sale of bonds on the basis negotiated by the State Treasurer, such an order is legal.

As to the question regarding the 5-year term, we note that the second paragraph of section 2 reads in part, "such bonds shall be dated, shall mature at such time or times not exceeding 20 years from their date . . . ." This language merely places a limitation on the length of time within which the bonds must mature. In the present instance, the bonds will mature serially within 5 years which is less than 20 years and, therefore, within the time stated in the Act.

A search of the Maine Revised Statutes does not reveal any general law which would prevent the procedure being used in this instance from being legal.

GEORGE C. WEST
Deputy Attorney General

September 16, 1969
Liquor Commission

William E. Gautreau, Director
Licensing Division

Interpretation of Sec. 301, Title 28

SYLLABUS:

The reference in 28 M.R.S.A. §301 to "school" is to an entire campus.

FACTS:

The Maine State Liquor Commission has asked the Office of the Attorney General for an interpretation of certain portions of 28 M.R.S.A. §301.

QUESTION:

Whether the reference in 28 M.R.S.A. §301 to "school" is to an entire campus or to buildings individually.

ANSWER:

The reference is to an entire campus.

REASONS:

The pertinent portion of 28 M.R.S.A. §301 reads as follows:

> "No new hotel, restaurant, tavern or club licenses shall be granted under this Title to new premises within 300 feet of a public or private school, school dormitory, church, chapel or parish house in existence as such at the time such new license is applied for, measured from the main entrance of the premises to the main entrance of the school, school dormitory, church, chapel or parish house by the ordinary course of travel, except such premises as were in use as hotels or clubs on July 24, 1937. . . ."

In *Smith v. Ballas,* 335 Ill. App. 418, 82 N. E. 2d 181 (1948), the statute in question read:

> "No license shall be issued for the sale at retail of any alcoholic liquor within 100 feet of any church, school, hospital, home for aged or indigent persons or for veterans, their wives or children or any military or naval station; . . . .".

The Court held that the reference in the statute to "school" meant within 100 feet of the school grounds; not merely a school building. In 28 M.R.S.A. §301, there is a reference to "school dormitory" as well as to "school", whereas the reference in the Illinois statute is only to "school". It appears that the additional reference in the Maine Statute was meant to include situations in which an off-campus dormitory was involved.

Therefore, it is concluded that the reference to "school" in 28 M.R.S.A.§301 refers to an entire campus.

WARREN E. WINSLOW, JR.
Assistant Attorney General

September 16, 1969
Dept. of Education

To: William T. Logan, Jr., Commissioner

Subject: Applicability of Maine Individual Income Tax to income received by Maine public school teachers after July 1, 1969, but which was earned prior to July 1, 1969.

SYLLABUS:

INCOME WHICH HAS BEEN RECEIVED BY MAINE PUBLIC SCHOOL TEACHERS AFTER JULY 1, 1969, BUT WHICH WAS EARNED PRIOR TO JULY 1, 1969 IS SUBJECT TO THE MAINE INDIVIDUAL INCOME TAX.

FACTS:

Most Maine public school teachers have the option to elect to receive their income for the teaching year over roughly a 10 month period from September through June, or over a 12 month period from September through August. Most teachers have elected to receive their pay over the 12 month period.

The Maine Individual Income Tax Law is effective as to individuals on July 1, 1969.

> "This Act shall take effect as to corporations January 1, 1969, and to all other taxpayers covered under this part July 1, 1969 and shall be applicable with respect to items of income, deduction, loss or gain *accruing* in taxable years ending on or after such effective date but only to the extent such items have been earned, *received,* incurred or accrued on or after such effective date." (emphasis supplied.)

QUESTIONS:

Whether income which has been received by teachers after July 1, 1969, but which was earned prior to July 1, 1969 is subject to the Maine Individual Income Tax?

ANSWER:

Yes.

REASONS:

Items of income which are affected by this law are "those items of income accruing" to the extent that the income has been "earned, received or accrued" after July 1, 1969. "Accruing" in the first instance is not used in a formal accounting sense, as a word of art, but is used generally to mean income arising, accumulating, or coming into existence.

> "While 'accrue' and its various derivatives are not new to the nomenclature of accounting or taxation, its use has not sufficed to build it into a word of art with a definite connotation . . ." *Helvering v. Enright* 312 U.S. 636, 643, (1961).

It is clear that, pursuant to the statutory language, items of income which are actually "received" on or after July 1, 1969 are taxable.

WENDELL R. DAVIDSON
Assistant Attorney General

September 17, 1969
State Board of Hairdressers

W. E. Gilpatrick, Executive Secretary

Licensing Beauty Shops in Nursing Homes

SYLLABUS:

A space in a nursing home reserved and equipped for the practice of hairdressing and beauty culture for the benefit of patients of the home must be licensed in accordance with 32 M.R.S.A.§1651.

FACTS:

A number of nursing homes have equipped a space as a beauty shop to serve the patients in the home, as a convenience to them. The shops are normally equipped like any other shops set up on a commercial basis.

QUESTION:

Is such a shop required to be licensed under 32 M.R.S.A. § 1651?

ANSWER:

Yes.

OPINION:

32 M.R.S.A.§1651 provides:

"No person, firm or corporation shall operate or cause to be operated a shop or establishment where hairdressing and beauty culture are practiced unless such shop or establishment has been duly licensed. . . ."

The spaces in nursing homes, reserved and equipped for the practice of hairdressing and beauty culture constitute shops or establishments within the meaning and intent of § 1651. There is no exception in the law governing hairdressing and beauty culture, such as is found in the law governing the practice of barbering, where it is provided (32 M.R.S.A. § 301, sub § 3):

"Cutting of hair, barbering and the practice of barbering shall be done only in a licensed barber shop by persons duly registered to practice barbering in this state, except in the following situations:

A. When done upon patients in hospitals or nursing homes; . . . ."

In view of the above, it seems clear that the Legislature intended that a beauty shop in a nursing home be licensed under § 1651.

LEON V. WALKER, JR.
Assistant Attorney General

September 17, 1969
Water & Air Environmental
Improvement Commission

R. W. Macdonald, Chief Engineer

Storm Drainage

SYLLABUS:

Discharge of purely storm water drainage by a municipality into a water course does not require a license from the Water & Air Environmental Improvement Commission pursuant to 38 M.R.S.A. §413. The Commission has no authority in this situation to take other action unless there is sufficient evidence of a classification violation to allow the Commission to make an order for enforcement under 38 M.R.S.A. §451.

FACTS:

The Town of Sanford is contemplating discharging a considerable amount of purely storm water drainage into Great Work's Brook. The Water & Air Environmental Improvement Commission considers that since storm drainage contains a substantial amount of sediment there is a danger of pollution from this sediment as well as from bacterial accumulation from ground wash.

QUESTION:

Whether the Water & Air Environmental Improvement Commission has the authority under Maine law in this situation to: 1) require a license of the Town for this discharge; 2) take other action.

ANSWER:

1) No.
2) See Opinion.

OPINION:

38 M.R.S.A.§413 relates to the standards necessary for requiring a license from the Water & Air Environmental Improvement Commission. Pertinent portions of 413 reads as follows:

> "*No* person, firm, corporation or *municipality* or agency thereof *shall discharge into any stream,* river, pond, lake or other body of water or watercourse of any tidal waters, whether classified or unclassified, *any waste, refuse or effluent from any manufacturing, processing or industrial plant or establishment or any sewage* so as to constitute a new source of pollution to said waters without first obtaining a license therefor from the commission. . . ." (Emphasis supplied)

It does not appear that purely storm water drainage is ". . . waste, refuse or effluent from any manufacturing, processing or industrial plant or establishment or . . . sewage" so as to require that the municipality obtain a license from the Commission.

With respect to other action, it appears that the Commission cannot withhold approval of the plans for a system of the type proposed.

Paragraph 7 of 38 M.R.S.A. 361 reads in part as follows:

"The commission shall consult with and advise the authorities of municipalities, persons and businesses having, or about to have, systems of drainage or sewerage *except purely storm water systems,* as to the best methods of disposing of the drainage or sewage with reference to the existing and future needs of the municipality, other municipalities, persons or businesses which may be affected thereby.

. . . Municipalities and sewer districts shall submit to said commission for its advice and approval the plans and specifications for any proposed new system of drainage, sewage disposal or sewage treatment, *except purely storm water systems* and any alterations in existing facilities. . . . ." (Emphasis supplied)

Under Paragraph 7, the Commission has no authority to consult and advise municipalities about systems of drainage or sewerage which are purely storm water systems. The same rule applies to submission of plans and specifications for proposed new systems.

The Commission is not barred from enforcement action if the situation develops to a point where there is sufficient evidence of a classification violation. In such case the Commission may make an appropriate order for enforcement under 38 M.R.S.A. § 451.

WARREN E. WINSLOW, JR.
Assistant Attorney General

October 1, 1969
Executive

Allen G. Pease, Administrative Asst.

SYLLABUS:

A Council Order for the purpose of expending funds must show on its face the source of the funds to be used.

FACTS:

On Tuesday, September 30, 1969, you telephoned and requested a written opinion answering a question relating to the purchase of an aircraft. The aircraft is for use of various state departments and the Governor. The matter was being considered by the Governor and Council at a special meeting that afternoon. The Council Order to be considered reads as follows:

"ORDERED, That the State Purchasing Agent be and hereby is authorized to accept the bid of Central Maine Flying Service, Inc., of Old Town, Maine, the low bidder, and to contract with the said firm in the net amount of $76,900.00 for delivery of a new State Executive Aircraft, a 1969 Piper Navajo Airplane, effective October 1, 1969.

STATEMENT OF FACTS

"Section 12 of Title 6 of the M.R.S.A. states in part that 'The Director shall have the care and supervision of such planes as may be owned by the State for the use of its departments and agencies and shall provide adequate hangar facilities and be responsible for the maintenance, repair, upkeep and operation of such planes, ...'

"The present aircraft was originally acquired under the Federal Surplus Property Program in 1960, converted from military to civilian use, and has been in continuous operation since. The Director feels that it should be replaced at this

time.

"Copies of the bids are available for examination. Funds are available in Account Number 4006.5, The Aeronautical Fund, to encumber the contract."

QUESTION:

Who has authority to purchase an executive aircraft, such to be used by state departments and the Governor?

ANSWER:

See Opinion.

OPINION:

First, we note that the order does not state from what fund or appropriation payment for the aircraft is to be made. A factual statement in the Statement of Facts indicates that funds are available in the Aeronautical Fund to encumber the contract. It must be noted that a Statement of Facts is no more than that and is not a part of the Council Order.

A Council Order, which purports to authorize a contract and expenditure of funds, must indicate what fund, appropriation or department is to be responsible for payment under the terms of the contract.

The instant Order being silent on this matter is of no effect as it authorizes no one to make payment under the contract.

GEORGE C. WEST
Deputy Attorney General

October 3, 1969
Executive

Governor Kenneth M. Curtis

SYLLABUS:

The Council Chambers must be open to any members of the public who may wish to attend pardon hearings.

FACTS:

The Governor, realizing the emotional reaction of some petitioners for pardon before the Governor and Council, would like to know who must be allowed admittance to pardon hearings.

QUESTION:

May the Governor and Council hold pardon hearings and close the doors of the hearing room to all but the press, petitioner and his representatives, without violating the public right to know laws of the State of Maine pursuant to 1 M.R.S.A. § 401, et seq?

ANSWER:

No.

REASON:

1 M.R.S.A. § 403 states that "ALL public proceedings shall be open to the public, and *all persons* shall be permitted to attend any meetings of these bodies or agencies . . . ." (Emphasis supplied.) Section 402 defines "public proceedings" as "The transactions of any functions affecting *any* or all citizens of the State by any administrative or legislative body of the State . . . ." (Emphasis supplied.)

The Governor and Council, sitting as a pardon board, are an administrative body, as opposed to a legislative or judicial body. As pardon hearings affect the citizens of this State, and as these proceedings are administrative, they fall within the purview of 1 M.R.S.A. § 401 et seq.

1 M.R.S.A. § 403 states that all public proceedings "shall be open to the public, and *all* persons shall be permitted to attend . . . . " (Emphasis supplied.) Admission of the press only would not satisfy the stated provision. Members of the press do not constitute the general public as clearly intended by this section.

JAMES S. ERWIN
Attorney General

October 6, 1969

Honorable Sam A. R. Albair
Executive Council
State House
Augusta, Maine

Re: Purchase of Executive Aircraft

Dear Councillor Albair:

SYLLABUS:

The Aeronautical Fund may not be used to pay for an aircraft for the general use of the Governor and state agencies having no aircraft.

FACTS:

The State seeks to purchase an aircraft for the general use of the Governor and state agencies having no aircraft. A Council Order was presented to and passed by the Council and approved by the Governor on September 30, 1969. The intent of the order was to pay for such an aircraft from the Aeronautical Fund. The order was defective. See Opinion of the Attorney General, October 1, 1969.

QUESTION:

May the Aeronautical Fund be used to purchase an aircraft for the use of the Governor and state agencies having no aircraft?

ANSWER:

No.

OPINION:

It must be pointed out that this opinion is written as of September 30, 1969. Beginning October 1, 1969 the Aeronautical Fund exists for the same purposes as prior to that date but only until it is exhausted. The revenues which formerly went into that Fund go into the General Fund as of October 1, 1969.

The Aeronautical Fund is governed by 36 M.R.S.A. § 2912.

> "Every distributor of internal combustion fuels shall keep a record of sales of such fuels as are sold to be used for aeronautical purposes and shall render a report thereof as provided in section 2906. To the Aeronautical Fund, as heretofore established, shall be credited the tax received by the State on internal combustion engine fuels which are sold to be used for aeronautical purposes. The necessary expenses of the collection of the tax on such fuels, to be used for aeronautical purposes, shall be deducted. All fees from the registration of aircraft and pilots as provided for by law and all fines, penalties and costs as imposed under the law relating to aircraft and pilots shall accrue to the Aeronautical Fund. Any unexpended balance from the above apportionments shall not lapse but shall be carried forward to the same fund for the next fiscal year and be available for such uses as indicated in this section. The Aeronautics Commission is authorized and directed to expend so much of the Aeronautical Fund as may be necessary for the purposes of carrying out the duties imposed upon it by law and to expend any unexpended balance in such fund toward the development and promotion of aviation, and to assist in construction, repair and the maintenance of, and the removal of snow from, municipal, state, county and federal airports in this State, and assist in the construction and maintenance of a system of air marking, in such manner and in such amounts as it shall deem equitable. Such assistance may likewise be given for snow removal on a state, federal, county or municipal owned airport used by a commercial air carrier of passengers and freight operating on a regular schedule, this assistance being extended to such carrier where the state, federal, county or municipal owner does not obligate itself and the airport is open to itinerant planes. The amounts in said fund are appropriated for the purposes set forth."

An analysis of this section as it relates to uses of the Fund reveals the following uses are permitted:

1. Necessary expenses of collection of gasoline tax.
2. Necessary for purposes of carrying out Commission duties.
3. Development and promotion of aviation. See also 6 M.R.S.A. § 2, subsection 2.
4. To assist in construction, repair and maintenance of municipal, state, county and federal airports in Maine.
5. To assist in removal of snow from airports listed in 4.
6. To assist in the construction and maintenance of a system of air marking.

It is obvious the items 1, 4, 5 and 6 would not be applicable to the question asked. If the Fund may be used for the purpose in the instant case, it must be by virtue of either 2 or 3.

The use of a state-owned aircraft instead of a commercial plane by the Governor or personnel of state agencies could hardly come under the heading of development and promotion of aviation.

The remaining item is that of being necessary for the purposes of carrying out the duties of the Aeronautic Commission. Note 6 M.R.S.A. § 2, wherein are set out general duties, (1) general progress in aviation; (2) development of aviation; (3) effecting uniform regulations throughout the state; (4) providing protection and promotion of public interest and safety in the operation of aircraft. More specific language is found in 6 M.R.S.A. § 42, but it all relates back to § 2. The Commission has responsibility for care and supervision of state-owned planes, except those owned or operated by Inland Fisheries and Game, Sea and Shore Fisheries or Forestry.

A thorough analysis of Title 6 reveals no language that can be construed as authorizing the purchase from the Aeronautical Fund of aircraft for use of the Governor and state agencies having no aircraft.

Very truly yours,

GEORGE C. WEST
Deputy Attorney General

October 15, 1969
Bureau of Taxation

Thomas S. Squires, Asst. Director,
Sales & Use Tax Division

Tax Status Under Sales and Use Tax Law of Pre-primary Non-profit Educational Institutions

SYLLABUS:

A PRE-PRIMARY NON-PROFIT EDUCATIONAL INSTITUTION DOES NOT QUALIFY FOR SALES AND USE TAX EXEMPTION AFFORDED "SCHOOLS" UNDER 36 M.R.S.A. §1760 SUB. 16.

FACTS:

A pre-primary non-profit educational institution prepares children for entrance to primary schools. The assumption is made that the institution meets all other qualifications for a school. A ruling has been requested by the institution's Secretary-Treasurer to the effect that sales to that educational institution be tax exempt and that a certificate of exemption be issued.

QUESTION:

Are sales to pre-primary non-profit educational institutions tax exempt under the State of Maine Sales and Use Tax Law?

ANSWER:

No.

REASONS:

Sales to schools are exempted from Sales and Use Tax Law 36 M.R.S.A. § 1760 Sub. 16. The cited sub-section includes a definition of schools which reads as follows:

". . .'Schools' mean incorporated nonstock educational institutions, including

institutions empowered to confer educational, literary or academic degrees, which have a regular faculty, curriculum and organized body of pupils or students in attendance throughout the usual school year, *which keep and furnish to students and others records required and accepted for entrance to schools of secondary, collegiate or graduate rank,* no part of the net earnings of which inures to the benefit of any individual." (Emphasis supplied).

The above definition establishes certain criteria which must be met before an educational institution can be considered a "school" under the Sales and Use Tax Law. We have been asked to assume that all qualifications have been met except that which relates to entrance requirements. Exemptions to tax laws must be construed strictly. The educational institution requesting the tax exemption certificate does not keep and furnish to students and others records required and accepted for entrance to schools of secondary, collegiate or graduate rank; therefore the institution does not meet all the requirements established by 36 M.R.S.A. § 1760 sub. 16 for tax exempt status and the tax exemption certificate must be denied.

JEROME S. MATUS
Assistant Attorney General

October 15, 1969
Maine State Retirement System

E. L. Walter, Executive Secretary

State Income Tax on State Retirement System Benefit Payments

SYLLABUS:

STATE RETIREMENT SYSTEM BENEFIT PAYMENTS IN EXCESS OF CONTRIBUTIONS ARE NOT EXEMPT FROM THE MAINE STATE INCOME TAX. ONLY THOSE BENEFIT PAYMENTS WHICH ARE INCLUDABLE FOR FEDERAL TAX PURPOSES WILL BE INCLUDABLE FOR MAINE INDIVIDUAL INCOME TAX PURPOSES. SUCH BENEFIT PAYMENTS ARE NOT SUBJECT TO THE WITHHOLDING PROVISIONS OF CHAPTER 827 OF THE LAW.

FACTS:

Pursuant to Chapter 101 of Title 5 M.R.S.A., the State retirement system provides various benefit payments, both retirement and disability, for qualifying State of Maine employees. Section 1003 of the law states:

"The right of a person to a retirement allowance, such retirement allowance itself, to the return of contributions, any optional benefit or death benefit or any other right accrued or accruing to any person under this chapter, and the moneys in the various funds created thereby, shall be exempted from any state, county or municipal tax in the State, and shall not be subject to execution, garnishment, attachment or any other process whatsoever, and shall be unassignable except as this chapter specifically provides."

On June 28, 1969 the 104th Legislature passed a personal and corporate income tax law which took effect as to individuals on July 1, 1969. 36 M.R.S.A., Chapters 801-839.

QUESTIONS:

1. Are State retirement system benefit payments in excess of contributions exempt from the Maine State Income Tax?
2. Are retirement system benefit payments subject to the withholding provisions of Chapter 827 of the law?

ANSWERS:

1. No.
2. No.

REASONS:

1. Title 5 M.R.S.A. § 1003 was first passed by P. L. 1941, Ch. 328 Sec. 227-P. Pursuant to § 1003 State retirement system benefit payments are exempted from any state tax.

On June 28, 1969 the 104th Legislature passed an individual and corporate income tax law, 36 M.R.S.A. Chapters 801-839, which took effect as to individuals on July 1, 1969. Section 5111 of the income tax law imposes a tax upon the "entire taxable income" of every resident individual. Section 5121 defines "entire taxable income."

> "The entire taxable income of a resident individual of this State *shall be* his federal adjusted gross income as defined in the laws of the United States with the modifications . . . provided in this chapter." (emphasis supplied).

Thus the basis is "federal adjusted gross income" subject only to those modifications specifically noted in § 5122.

Those State of Maine employees who qualify to receive any of the various benefit payments pursuant to Chapter 101 of Title 5 M.R.S.A. and who are resident individuals will treat these payments in the same manner as they do for federal tax purposes. If the payment is taxable for federal purposes, then it is taxable for State purposes. It should be understood that the Maine Individual Income Tax is based on federal adjusted gross income and as a result there is no tax upon an individual's contribution to the retirement system. Also, disability and death benefit payments will be includable in Maine income only if they are includable for federal purposes.

It is manifest that § 1003 of the retirement act is repugnant to or inconsistent with the newly enacted Maine Individual Income Tax Law. The question then becomes whether or not the doctrine of implied repeal will control. This doctrine was reviewed by the Maine Supreme Court in *State v. London,* 156 Me. 123 (1960). The Court stated at page 127:

> "It is, however, equally well established that repeals by implication exist when a later statute covers the whole subject matter of an earlier statute, or when a later statute is repugnant to or inconsistent with an earlier statute. This principal has been expressed in appropriate language in many cases in this State."

The newly enacted individual income tax law is not repugnant to the whole of Title 5 M.R.S.A. § 1003, but only to that part dealing with the exemption of benefit payments from any state taxes. With reference to a partial inconsistency or repugnancy such as the one before us, the Court in the decision cited above stated at page 128:

> "Where a later statute does not cover the entire field of the earlier statute but is inconsistent or repugnant to some of its provisions, a repeal by implication takes place to the extent of the conflict."

The Court's reasoning above has been followed in recent Maine decisions. *State v. Bryce,* 243 A2d 726 (1968), *State v. Taplin,* 247 A2d 919 (1968). It is the opinion of this office that the doctrine of implied repeal, which has long been recognized by our Court, must be followed.

The legislature in enacting a state income tax made specific provision for certain modifications to federal adjusted gross income. No reference was made as to the includability or excludability of these benefits. It must be assumed that in enacting this law, the legislature was aware of the existence of Title 5 M.R.S.A. § 1003, and that the failure to include these benefit payments within the modifications of § 5122, shows clearly that the Legislature did not intend to exclude these benefit payments from "entire taxable income." One must first look to the statute itself for evidence of legislative intent. *Hunter v. Totman,* 146 Me. 259, 265 (1951). The income tax law does include these benefits. In *Knight v. Aroostook Railroad,* 67 Me. 291 (1877), the Court stated at page 293:

> "This well settled rule of interpretation is founded on the reasonable inference that the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law."

Lastly, it should not be forgotten that taxation is the rule and exemptions from taxation are exceptions to the rule and are to be strictly construed against the individual claiming the exemption. *Inhabitants of Town of Owls Head v. Dodge,* 151 Me. 473.

2. Section 5250 of Chapter 827 of the law requires that "every employer maintaining an office or transacting business within this State and making payment of any *wages* taxable under this part . . . shall deduct and withhold from such wages for each payroll period a tax . . ." (emphasis supplied). Since such retirement benefits are not wages, they are not subject to withholding pursuant to the provisions of § 5250.

WENDELL R. DAVIDSON
Assistant Attorney General

October 16, 1969
Personnel

Willard R. Harris, Director

SYLLABUS:

The decision of the Director of Personnel under 5 M.R.S.A. § 753, subsection 5, adverse to a department or commission, is binding on the department.

FACTS:

A State employee was on "lay-off" status. The department hired another employee in place of the complaining employee. The Director of Personnel in accordance with 5 M.R.S.A. § 753, subsection 5, advised the department head that he had improperly failed to re-employ the employee. The department refused to accept the ruling of the

Director of Personnel.

Title 5 M.R.S.A. § 753, subsection 5 provides as follows:

"5. Appeal to Director of Personnel. If the classified employee is dissatisfied with the decision, following a meeting with the department head, he shall appeal to the Director of Personnel who shall, within 6 working days, reply in writing, to the aggrieved employee and the department head involved in his decision, based on the state's personnel law and rules."

QUESTION:

Is the decision of the Director of Personnel that is provided for in 5 M.R.S.A. §753, subsection 5, binding on State departments?

ANSWER:

Yes.

REASON:

The decision of the Director of Personnel must be based upon the State's personnel law and rules (5 M.R.S.A. §753, subsection 5). The rules in question are established by the personnel board and administered by the director (5 M.R.S.A. §672).

The newly enacted State Employees Appeals Board law (5 M.R.S.A., Ch. 63), of which the aforementioned subsection 5 is a part, essentially provides for an appeal by an employee from a decision that is made *against* his interests. Indeed, the very title of the chapter bears out this theory. The intent of the chapter does not include the proposition that the State departments have a right to appeal.

Inasmuch as the Director of Personnel, acting under the overall direction of the personnel board, administers the personnel law and rules, his decisions are binding upon departments when personnel questions are involved. Of course, pure questions of law must be submitted to the Attorney General's Department.

It is consequently my opinion that the decision of the Director of Personnel under 5 M.R.S.A. §753, subsection 5, is binding on State departments unless and until appealed from under subsection 6 by the aggrieved employee.

HARRY N. STARBRANCH
Assistant Attorney General

October 15, 1969
Inland Fisheries & Game

Ronald T. Speers, Commissioner

Status of Commissioner as a Fish & Game Warden

SYLLABUS:

The Commissioner of Inland Fisheries and Game, who is appointed by the Governor and receives a salary set by statute, cannot be considered to be a Fish and Game Warden, who is appointed by the Commissioner under the Personnel Law, whose compensation is

under the Personnel Law, and who by statute can hold no other state office from which he receives compensation.

FACTS:

The Commissioner of Inland Fisheries and Game has general supervision of the administration and enforcement of the inland fish and game laws, which includes supervision and inspection of the warden service, and appointment of Wardens.

QUESTION:

May the Commissioner be considered to be a Warden?

ANSWER:

No.

OPINION:

Although under 12 M.R.S.A. §1952, the Commissioner has "general supervision of the administration and enforcement of the inland fish and game laws," including supervision of Wardens and inspection of the warden service, other provisions of these laws lead to the conclusion that he cannot be considered to be a Warden.

> 12 M.R.S.A. § 2001, provides that "the Commissioner shall appoint persons as fish and game wardens who shall have qualified under the written code prepared by the commissioner and approved by the Personnel Board. The compensation of the wardens shall be determined under the Personnel Law and shall not be more than one pay grade below that of the Maine State Police."

Section 1951 provides for appointment of a Commissioner by the Governor with the advice and consent of the Council, who shall hold office for 3 years or until his successor is appointed and qualified, and further provides that he shall receive a stated annual salary and all necessary travel expenses.

It is also provided in § 2003 that Wardens appointed under the fish and game laws "shall hold no other state . . . office from which they receive compensation."

The disparity between the provisions for appointment and compensation of wardens, and those pertaining to the Commissioner, together with the provision of § 2003 that a Warden cannot hold the position of Commissioner, force a conclusion that the Commissioner cannot be considered to be a Warden.

In your letter of October 1, 1969, you indicate that the duties and powers of Wardens devolve upon you through the office of the Commissioner. While the Commissioner has general supervision of the administration and enforcement of the fish and game laws, including Wardens and the Warden service, the actual enforcement of these laws is given to the Wardens by § 2001, and does not become a duty and power of the Commissioner by virtue of his office.

LEON V. WALKER, JR.
Assistant Attorney General

October 23, 1969
State

Joseph T. Edgar, Secretary of State

This is in reply to your memorandum of October 2, 1969.

SYLLABUS:

A registered voter in a municipality is not necessarily a legal resident of that municipality for all other purposes.

FACTS:

Some individuals applying for resident hunting and fishing licenses and motor vehicle operator's license are residing and working outside the State but are carried on the voting list of a municipality within the State as registered voters.

QUESTION:

Does the fact that a person is a registered voter in this State presuppose his being a legal resident entitled to receive resident hunting and fishing licenses and motor vehicle operator's license?

ANSWER:

No.

OPINION:

The *registrar of voters* of a municipality, by 21 M.R.S.A. §171, has the exclusive power to prepare and revise the voting list, and under §101 to determine an applicant's qualifications as set forth in § 241, which requires the establishment of a voting residence in the State and municipality.

It is the duty of the *clerk of the municipality,* or appointed agent, to determine eligibility for resident hunting and fishing licenses; it is the Secretary of State's duty to be satisfied that an applicant for an operator's license is a proper person to receive it.

The fact that an applicant for one of these licenses is a registered voter may be considered in determining his eligibility for a license as a resident; but should not be considered conclusive evidence that he is a resident at the time of the application. Other evidence to be considered includes ownership of a home, place of abode, payment of taxes, place of work, and any other evidence indicating the applicant's intent to make the municipality his permanent home, or only to be there temporarily.

LEON V. WALKER, JR.
Assistant Attorney General

October 24, 1969
Forestry

Austin H. Wilkins, Commissioner

Submarine cable in great pond – permit requirements

SYLLABUS:

Where the laying of a submarine cable in a great pond involves no dredging and disposal of dredged material, no permit is required under 12 M.R.S.A. § 514 (3) (B) (Supp. 1968). A public utility wishing to lay a submarine cable in a great pond must obtain an easement, permitting such use, from the legislature.

FACTS:

A public utility plans to lay a submarine cable beneath the waters of a great pond. It appears that the project involves no dredging and disposal of the dredged material. The utility has applied to the Forest Commissioner for the permit described in 12 M.R.S.A. § 514 (3) (B) (Supp. 1968).

QUESTION:

Is such a permit required?

ANSWER:

No.

OPINION:

The permit described in the reference statute allows

" . . . dredging in great ponds and for disposal of the materials thereby removed which are not classified as minerals under the mining law . . . "

Since such dredging and disposal are not contemplated as part of the cable project, no permit is required. However, the utility must obtain an easement from the state in order to lay the cable on the bottom of the great pond, since this land is the property of the state. Such easements have, in the past, been granted by the legislature. See, *e.g.*, Me. Private and Special Laws 1969, c. 49.

ROBERT G. FULLER, JR.
Assistant Attorney General

November 5, 1969
Soil & Water Conservation Comm.

Charles L. Boothby, Executive Director

Great Ponds

SYLLABUS:

Although the point has never been squarely decided in Maine, case law would appear to indicate that an artificially impounded body of water having a surface area in excess of 10 acres is not a "great pond" within the meaning of the Colonial Ordinance of 1641-47.

QUESTION:

Is an artificially impounded body of water having a surface area in extent of 10 acres a "great pond" within the meaning of the Colonial Ordinance of 1641-47?

ANSWER:

The cases indicate that it is not.

OPINION:

This question appears never to have been squarely presented to a court of last resort in either Maine or Massachusetts. However, there are *dicta* in both jurisdictions indicating that the term "great pond" means only a body of water whose surface area, in its *natural* state, exceeds 10 acres.

In *Commonwealth v. Tiffany*, 119 Mass. 300 (1876), the court stated:

> "But the term 'great pond', as used in the Body of Liberties, Art. 16, 25 Mass. Hist. Coll. 219; in the colony ordinance of 1647; Anc. chart, 148, 149; and in St. 1869, means a pond of a certain area created by the natural formation of the land at a particular place." 119 Mass. 300, 303.

In *Robinson v. White*, 42 Me. 209, (1856), the Maine court, in construing a deed description, appeared to distinguish between natural and artificial ponds in excess of ten acres for conveying purposes. Said the court:

> "Where land is bounded upon a lake or pond, if it is in its natural state, it would seem that the grant extended only to the water's edge. (Citation omitted)
>
> Where the pond is an artificial one, 'it would be natural to presume,' remarks SHAW, C.J. in *Waterman v. Johnson*, 13 Pick. 261, 'that a grant of land bounding upon such a pond, would extend to the thread of the stream upon which it is raised, unless the pond had been so long kept up to become permanent, and to have acquired another well defined boundary." 42 Me. 209, 218.

Whittlesey cites the *Tiffany* case and several Maine cases as authority for the statement " 'Great pond' means a pond of the area specified in the Ordinance, or subsequently otherwise defined by statute, and created by the natural formation of the land." Whittlesey, *Law of the Seashore, Tidewaters and Great Ponds*, 45. Only *Tiffany*, however, actually supports this statement.

ROBERT G. FULLER, JR.
Assistant Attorney General

November 5, 1969
Forestry

Austin H. Wilkins, Commissioner

Public reserved lots

SYLLABUS:

The Forest Commissioner has no power under 30 M.R.S.A. § 4162 to authorize the use of a public reserved lot as a municipal dump.

FACTS:

The Selectmen of a municipality wish to make use of a public reserved lot as a municipal dump and have applied to the Forest Commissioner for permission to do so. It appears that such use has heretofore been made by the municipality.

QUESTION:

May the Forest Commissioner authorize the use of a public reserved lot as a municipal dump?

ANSWER:

No.

OPINION:

The powers of the Forest Commissioner with respect to public reserved lots appear at 30 M.R.S.A. § 4162. Under this statute, the Commissioner may under the direction of the Governor and Council sell timber and grass rights; lease campsites, mill privileges, dam sites, flowage rights and the right to set poles and to establish utility service; grant mining rights and the right to build and maintain public roads; and with the permission of certain officials sell timber and grass stumpage, and gravel for certain limited uses. No power is given to the Commissioner to grant a right to maintain a municipal dump on a public reserved lot.

The fact that the municipality has made use of the lot as a municipal dump is of no legal significance. Such use amounts to a trespass on state land; and causes no rights to accrue to the municipality as against the state.

ROBERT G. FULLER, JR.
Assistant Attorney General

November 11, 1969
Maine State Retirement System

E. L. Walter, Executive Secretary

SYLLABUS:

Only persons who are in fact receiving a retirement allowance that had been computed on the basis of a 5-year average highest compensation are entitled to a recomputation of benefits under the new subparagraph (5) of Section 6 of the Public

Laws of the State of Maine (1969), Chapter 415.

FACTS:

The new subparagraph (5) of Section 6 of the Public Laws of the State of Maine (1969), Chapter 415 states in part as follows:

> " . . . each person who is receiving a retirement allowance which had been computed on the basis of a 5-year average highest compensation shall be entitled to a recomputation of benefits based upon a 3-year average highest compensation but not less than an increase of 2% on the basic retirement allowance . . . ."

The Executive Secretary of the Maine State Retirement System in a memorandum dated October 21, 1969 relates in part as follows:

> "There are 88 persons, former teachers, who had retired prior to the date that the two Systems were merged on July 1, 1947, and who had retired on length of service, that is 25, 30 and 35 years at minimum dollar amounts, and were not retired 'on the basis of a 5-year average highest compensation.' Further, there are 13 persons who are drawing retirement allowances now and who retired under Council Order and also did not retire 'on the basis of a 5-year average highest compensation.' "

QUESTION:

Is the adjustment referred to above available to the 88 persons whose retirement allowance had not been computed on the basis of a 5-year average highest compensation?

ANSWER:

No.

REASON:

The above-quoted wording states in part that "each person who is receiving a retirement allowance *which had been computed on the basis of a 5-year average highest compensation* shall be entitled to a recomputation of benefits." (Emphasis supplied.)

The words "each person who is receiving a retirement allowance" is modified by the wording "which had been computed on the basis of a 5-year average highest compensation." Consequently, only persons who are in fact receiving a retirement allowance that has been so computed are eligible under the hereinabove-quoted wording to a recomputation of benefits of not less than an increase of 2% on the basic retirement allowance.

Under these circumstances, the 88 persons described under FACTS whose retirement allowance had not been computed on the basis of a 5-year average highest compensation would not be eligible for a recomputation based upon the wording of the statute quoted above.

HARRY N. STARBRANCH
Assistant Attorney General

November 12, 1969
Accounts and Control

Henry L. Cranshaw, State Controller

Purchaser of Airplane by Department of Aeronautics

SYLLABUS:

The Aeronautics Director has the authority to purchase an airplane from the Aeronautics Fund for use by the Director and other employees of the Aeronautics Department in carrying out the provisions of the Aeronautics Act.

FACTS:

P.L. 1969, Ch. 498, abolishes the Maine Aeronautics Commission and establishes a Department of Aeronautics administered by an Aeronautical Director. The Director has plans to purchase an airplane as a replacement of aircraft purchased by the Commission.

QUESTION:

Does the Aeronautical Director have the authority to purchase an airplane from the Aeronautics Fund if required to enforce the above-mentioned law?

ANSWER:

Yes.

OPINION:

The state airways system, consisting of all air navigation facilities available for public use is, by 6 M.R.S.A. § 4, under the jurisdiction of the Aeronautics Department whose Director prescribes the terms and conditions of the activities authorized for each facility. By 6 M.R.S.A. § 12, the Director is charged with making rules and regulations concerning air traffic with supervision and control of all state airports and with the making of rules and regulations deemed necessary for the efficient management thereof, and the development of aviation. He is charged with the care and supervision of state-owned planes and for the maintenance, repair, upkeep and operation of such planes. He has general supervision over all matters pertaining to the location, construction and maintenance of all air navigation facilities. And under § 13 he has the power to hold investigations, inquiries and hearings concerning matters covered by the Maine Aeronautics Act.

These many responsibilities and activities clearly show the need for the Director, and employees of the Department under his direction, to travel extensively to the air facilities within the State, and to have first-hand knowledge of flying requirements and the capabilities of the various facilities, justifying the acquisition of an aircraft from the Aeronautics Fund for the enforcement of the Aeronautics Act.

LEON V. WALKER, JR.
Assistant Attorney General

November 13, 1969
Forestry

Austin H. Wilkins, Commissioner

Fill in great pond

SYLLABUS:

A littoral proprietor on a great pond who would deposit fill in such pond below ordinary low-water mark must first obtain the permit described in 12 M.R.S.A. § 514(3) (c) (Supp. 1968).

FACTS:

A littoral proprietor on a great pond placed fill therein during November, 1968. No facts are recited to indicate whether such fill extends below ordinary low-water mark.

QUESTION:

Must the proprietor obtain the permit described in 12 M.R.S.A. § 514(3) (c) (Supp. 1968)?

ANSWER:

Yes, if such fill extends below ordinary low-water mark.

REASON:

The boundary between private and public property on the shore of a great pond is ordinary low-water mark. *Wood v. Kelley,* 30 Me. 47 (1849), *Stevens v. King,* 76 Me. 197 (1884); *cf. McFadden v. Haynes Ice Co.,* 86 Me. 319 (1894). Accordingly, if the fill extends below ordinary low-water mark, it extends onto public property and permission for such encroachment must be obtained in the form of the permit to which reference has been heretofore made.

ROBERT G. FULLER, JR.
Assistant Attorney General

November 13, 1969
Liquor Commission

Keith Ingraham, Chairman

SYLLABUS:

A refund must be granted to the wholesalers for the excise tax imposed on malt beverages sold by wholesalers to United States military bases under 28 M.R.S.A. § 452.

FACTS:

The Liquor Commission taxes the sale of malt liquor by all wholesalers to all

retailers. *28 M.R.S.A. § 452.* In some cases the Commission allows a refund. 28 M.R.S.A. § 452 provides in part that:

"* * * .

"A refund shall be granted for the excise tax imposed by this State on malt beverages sold by wholesalers to any instrumentality of the United States or any Maine National Guard state training site accredited with exemption by the commission. A refund shall be granted for the excise tax imposed by this State on malt beverages sold to any vessel of foreign registry. Any wholesaler selling to such an instrumentality, training site or vessel shall present proof of such sale to the commission and shall thereupon receive from the Treasurer of State a refund of all state excise taxes paid in connection with such sale."

The Commission currently interprets the word "accredited" to modify "instrumentality" as well as National Guard training sites. Further, it has refused to accredit either Rockland Station, Rockland, Maine, or Dow Air Force Base, Bangor, Maine. The tax is imposed on the wholesaler and the military installation is not directly taxed; however, the practical result of refusing to refund the wholesaler's excise tax is that the wholesaler charges the non-accredited installation a higher price.

QUESTION:

Whether 28 M.R.S.A. § 452 gives the Commission power to refuse to refund to the wholesaler the tax on the malt liquor sold to federal bases?

ANSWER:

No.

REASON:

Our reasoning is based on legislative history. P. L., 1957, c. 355, § 5, said:

"Excise taxes on malt beverages imposed by the state shall not apply to malt beverages sold by wholesalers holding licenses from the commission to any instrumentality of the United States."

This statute precluded the Commission from imposing an excise tax on malt liquor sold to United States military installations.

In 1963, the Legislature imposed a non-discriminatory tax on all malt liquor sold by wholesalers. This tax included malt liquor sold to United States government instrumentalities but provided for a refund of the excise tax to wholesalers selling to a United States government instrumentality. However, the 1963 law gave the Commissioner's accreditation power over National Guard training sites.

P.L. 1963, c. 303, reads as follows:

"A refund shall be granted for the excise tax imposed by this state on malt beverages sold to any instrumentality of the United States or any Maine National Guard state training site accredited with exemption by the commission."

The 1963 statute clearly provides for a refund under the given facts.

RICHARD W. GERRITY
Assistant Attorney General

November 17, 1969

Governor Kenneth M. Curtis
and Executive Council
State House
Augusta, Maine

Gentlemen:

SYLLABUS:

The Governor and Council do not have authority to transfer funds from an appropriation account to a bond issue account.

FACTS:

The 103rd Legislature, by Private and Special Law Chapter 152, proposed a bond issue in the amount of $350,000 for construction of a regional facility for the mentally retarded. The federal government will match this amount. At the present time the proposed facility will cost more than the amount of the bond issue and the amount of the federal funds.

In order to provide sufficient funds to meet the cost of the proposed facility, the Department of Mental Health and Corrections has presented an order to the Governor and Executive Council by which a sum would be transferred from an appropriation to that Department to the bond issue account. Funds would be taken from Personal Services and All Other of an appropriation made to the Department by the 104th Legislature.

QUESTION:

May the Governor and Council transfer funds from an appropriation account to a bond issue account?

ANSWER:

No.

REASONS:

The Council Order referred to in the Facts presumably is based on the provisions of Title 5 M.R.S.A. § 1585. This section reads as follows:

> "Any balance of any *appropriation or subdivision of an appropriation* made by the Legislature for any state department or agency, which at any time may not be required for the purposes named in *such appropriation or subdivision,* may, upon the recommendation of the department or agency head concerned and the State Budget Officer, be transferred by the Governor and Council, at any time prior to the closing of the books, *to any other appropriation or subdivision of an appropriation* made by the Legislature for the use of the same department or agency for the same fiscal year." (Emphasis supplied)

It is to be noted that this provision relating to transfers uses the word "appropriation" throughout. It states very clearly that the balance of any

"appropriation" made by the Legislature may be transferred "to any other appropriation." In short, the Legislature has authorized the Governor and Council to transfer within a Department funds from one appropriation to another appropriation.

There is no provision in the statutes whereby the Governor and Council are authorized to transfer funds from an "appropriation" to a "bond issue account." A "bond issue account" is not an "appropriation." A bond issue is proposed by the Legislature and approved by the people. An "appropriation" is credits advanced to a department or agency out of funds under the control of the Legislature and by legislative act which does not need the approval of the people.

The two accounts are of a different nature and the Governor and Council have not been given authority to transfer funds from one to another. It, therefore, follows that the proposed transfer is not within the jurisdiction of the Governor and Council.

Very truly yours,

GEORGE C. WEST
Deputy Attorney General

November 19, 1969

Dr. Keith L. Crockett
Assistant Commissioner
Department of Education
State Office Building
Augusta, Maine

Dear Dr. Crockett:

SYLLABUS:

A municipal corporation or school administrative district is required to obtain a license for its school buses from the Public Utilities Commission before it operates them for the purpose of transporting passengers other than students to and from school and students and chaperones to and from school activities.

FACTS:

A municipal school department or a school administrative district owns and operates certain vehicles which are primarily utilized to transport school children to and from schools and to and from school activities. On occasion, however, these vehicles are utilized for other purposes, such as the transportation of:

a. Children from the community (district) to a city in which such activities as the Shrine Circus are being performed. The children may pay their bus fare individually or it may be paid by some organization which is sponsoring the trip;

b. People over 75 years of age from the community (district) to a second community where an activity such as the Three-Quarter Century Club annual meeting is being held, the fare being paid either by the individual passengers or the organization sponsoring the trip;

c. Children from the community (district) to a nearby community where the Red Cross is conducting a swimming instruction program, the transportation fare to be paid by the children individually or by some sponsoring organization.

QUESTION:

May the municipality or the school administrative district which owns and operates school buses utilize them in activities such as those described in Facts without first obtaining a license to do so from the Public Utilities Commission?

ANSWER:

According to 35 M.R.S.A. § 1643,

> "No person shall operate a motor vehicle for the transportation of passengers in special or charter service as defined in Section 1642 on any street or highway in any city or town of this state unless there is in force with respect to such person a license issued by the (Public Utilities) Commission authorizing such operations."

Section 1642, as amended by P. L. 1969, c. 16, defines the term "special or charter carrier of passengers by motor vehicle" as,

> ". . . every person who or which engages in the transportation by motor vehicle of passengers for hire other than transportation referred to in Section 1501 (the common carrier) for which a certificate is required under Section 1505."

The definition continues, however, by stating the term shall not include:

> "1. School bus. The operation of a school bus as defined in Title 29, Section 2011, when such school bus is engaged in transportation of children to and from school and to and from any school-sponsored activity when such school-sponsored activity is performed as part of a continuing contract to transport children to and from school sessions. Such transportation may include a reasonable number of chaperones formally designated as such by school authorities."
>
> (Amended by P. L. 1969, C. 16.)

It is recognized that 29 M.R.S.A. § 2011 defines the phrase "school bus" in somewhat broader terms than the exemption set forth in 35 M.R.S.A. § 1642 (1).

> "The term 'school bus' includes every motor vehicle with a carrying capacity of 10 or more passengers, owned by a public or governmental agency or private school and operated for the transportation of children to or from school, or to or from any school activities at a school regularly attended by such children, or privately owned and operated for compensation for the transportation of children to or from school or to or from any school activities at a school regularly attended by such children, or to and from any municipally sponsored, nonschool activity within the State for which use of a bus has been approved by the superintending school committee, community school committees or board of directors; school as used in this sentence shall mean either a private or public school. Buses operated by a motor carrier having a certificate of public convenience and necessity issued by the Public Utilities Commission under Title 35, sections 1501 to 1518, which comply with the requirements of the commission shall not be regarded as 'school buses'."

The Legislature was clearly aware of the breadth of the school bus definition of Title 29, Section 2011, when it enacted in 1961 and modified in 1969 the exemption from Public Utilities Commission regulation applicable to school buses. In fact, the definition of Title 29 was specifically referred to in the exemption of Title 35. While a municipal corporation or SAD may operate a school bus within the meaning of 29 M.R.S.A. § 2011, it may not operate beyond the limitations of 35 M.R.S.A. § 1642 (1) without first

having obtained a license from the Public Utilities Commission.

It is noted that the statutory language of the Public Utilities Commission regulatory law speaks in terms of a *"person,"* as opposed to a municipal corporation or school administrative district, obtaining a license to operate in special or charter service. That the specific statutory language does not state reference to corporations, municipal corporations or administrative school districts, does not alter this opinion.

The Rules of Construction of the Maine Statutes, 1 M.R.S.A. § 72 (15), affirmatively states that the term "person" may include a body corporate. The word may be properly construed to include a municipal corporation as well as a private corporation.

Therefore, a municipal corporation or school administrative district is required to obtain a license from the Public Utilities Commission before it operates a school bus it owns for the purpose of transporting passengers other than students to and from school, and students and chaperones to and from school activities.

Very truly yours,

HORACE S. LIBBY
General Counsel
Public Utilities Commission

GEORGE C. WEST
Deputy Attorney General
Dept. of Attorney General

December 5, 1969
Probation and Parole

G. Raymond Nichols, Director

Affect of P.L. 1969, Chapter 460, AN ACT To Provide for the Expunging of Certain Records of Arrest on State Division of Probation and Parole

SYLLABUS:

The Division of Probation and Parole is not a law enforcement agency subject to expunging of arrest records provisions under 16 M.R.S.A. § 600, P.L. 1969, c. 460, AN ACT To Provide for the Expunging of Certain Records of Arrest.

FACTS:

Probation and Parole officers of the Division of Probation and Parole are involved in the conduct of investigations requested by the Courts in criminal cases. Reports prepared in connection with such investigations contain information relative to the arrest of individuals under investigation.

QUESTION:

Are records of the Probation and Parole Division subject to P.L. 1969, c. 460, AN ACT To provide for the Expunging of Certain Records of Arrest?

ANSWER:

No.

REASON:

" § 600. Records of arrests

Whenever a person has been acquitted of a crime in any court or has had a complaint, information or indictment against him dismissed by any court, the clerk of that court shall forward a certified copy of the docket entry of acquittal or dismissal to any law enforcement agency, including the State Bureau of Identification, having records of arrest or detention relating to the arrest of the person. Upon the receipt of the certified copy, each agency shall expunge from its records, excluding investigative and communication records, fingerprints and photographs, any reference to the arrest of the person on that charge. The State Bureau of Identification shall forward a copy of the docket entry to the Federal Bureau of Investigation . . . . "

The issue to be resolved here is whether the Division of Probation and Parole is a law enforcement agency and thus, subject to the expunging of arrest records provisions of T. 16 M.R.S.A. § 600.

We look to Maine Statutes for assistance by way of a manifested legislative intent as to agencies considered within the purview of the cited section. We find the following language in 34 M.R.S.A. § 1551:

" . . . . . The Department of Health and Welfare, Department of Mental Health and Corrections, officers and staffs of the penal and correctional institutions, and *law enforcement agencies* in the State shall *cooperate* with the board in exercising its administration." [Emphasis ours]

Title 4, M.R.S.A. § 173

"The following provisions shall apply to the District Court:

. . . . . The term 'law enforcement officer' shall include a state police officer, game warden, state liquor inspector, sheriff, deputy sheriff, municipal police officer, constable and any person whose duty it is to enforce any criminal law of this State by making arrests."

The only arrest authority vested in a Probation and Parole officer is set forth in 34 M.R.S.A. §1502:

"The general powers and duties of a probation-parole officer are:

. . . . . 7. Arrest violators. To arrest and return probation and parole violators on warrants issued by the appropriate authorities."

This section is subject to an exception contained in 34 M.R.S.A. § 1675, as amended, relative to arrest and detention of a parole violator without a warrant. This arrest authority, however, is unrelated to violations of the law and relates only to violations of probation and parole conditions, and although, the breach of a condition may be a violation of the law, arrest with respect thereto is based upon a warrant acted upon by a law enforcement officer.

From the foregoing we perceive two classes of officers and agencies. Law enforcement on the one hand, and Probation and Parole as a part of the correctional arm of the State, cooperating with law enforcement officers and agencies on the other hand.

We are, therefore, of the opinion that the Division of Probation and Parole is not subject to expunging of arrest records under 16 M.R.S.A. § 600, such Division being outside the category – law enforcement agency. Furthermore, it is asserted that records of the Division of Probation and Parole not arising from initiation of arrest for crime in

any case, and considering the function of Probation and Parole officers, particularly with reference to their relationship to the Courts, would be within the exclusion found within 16 M.R.S.A. § 600, since the same are "investigative" records.*

*Reaching this conclusion there is no need for discussion of the confidential nature of records of the Probation and Parole Division rendered confidential under 34 M.R.S.A. § 1. This subsidiary issue was raised by the agency making the request for this opinion and is not explored nor developed due to our conclusion.

COURTLAND D. PERRY
Assistant Attorney General

December 9, 1969
Governor Baxter State School for the Deaf

Joseph P. Youngs, Jr., Supt.

Applicability of P.L. 1969, Chapter 320 to Governor Baxter State School for the Deaf in Providing Certain Services to Students.

SYLLABUS:

Provision of group auditory amplification equipment to deaf students for classroom use is not subject to control under 32 M.R.S.A. Chapter 23 A. The Governor Baxter State School for the Deaf may purchase and sell to students at cost hearing aid batteries and cords without violating any provision of 32 M.R.S.A. Chapter 23 A, but any other hearing aid accessories must be purchased from a licensed hearing aid dealer.

FACTS:

The Governor Baxter State School for the Deaf provides group auditory amplification equipment to deaf students for use in classroom instruction.

The Governor Baxter State School for the Deaf purchases and makes available to students at cost, hearing aid accessories, e.g., batteries and cords.

QUESTIONS:

Are either of the following practices violative of any provision of 32 M.R.S.A. Chapter 23 A, P.L. 1969, Chapter 320:

1. Provision of group auditory amplification equipment to deaf students for classroom use?
2. Purchase and resale at cost to students of hearing aid accessories, i.e., batteries and cords?

ANSWERS:

1. No.
2. No.

REASON AS TO QUESTION NO. 1:

32 M.R.S.A. §1658, subsection 3 provides as follows:

"As used in this chapter, unless the context requires otherwise:

. . . . .

"3. Hearing aid. 'Hearing aid' shall mean any wearable instrument or device designed for or offered for the purpose of aiding or compensating for impaired human hearing, and any parts, attachments or accessories, including earmold, but excluding batteries and cords . . . ."

The above quoted subsection defines auditory instruments subject to control under 32 M.R.S.A. Chapter 23 A and makes specific reference to "wearable" instruments. It is our opinion that group auditory amplification equipment such as that provided for use in classrooms in the Governor Baxter State School for the Deaf, although the receiver thereof may be temporarily worn on the person during classroom session, falls outside the purview of Chapter 23 A and is thus, not subject to its provision. Instruments intended to be controlled by Chapter 23 A are the personal hearing aids individually fitted to specification and individually worn by the owner and carried entirely upon the person. Furthermore, the provision of such group auditory amplification equipment for the use of deaf students in the classroom can not be said to be fitting and dealing in hearing aids within the contemplation of 32 M.R.S.A. Chapter 23 A, the practices subject to control thereunder.

REASON AS TO QUESTION NO. 2:

Batteries and cords are specifically excluded from the definition of hearing aids which includes other accessories. It is, therefore, our opinion that batteries and cords may continue to be sold to the Governor Baxter State School students at cost, but that any other accessories not specifically excluded are required to be sold by a dealer licensed under 32 M.R.S.A. Chapter 23 A. The purchase by any student of any such other accessories shall only be from a licensed dealer.

COURTLAND D. PERRY
Assistant Attorney General

December 10, 1969
Environmental Improvement
Commission

George C. Gromley, Supervision Engineer

Pollution Abatement Facility Planning Grants

SYLLABUS:

1. The vote to proceed with a pollution abatement construction program, which is a prerequisite under 38 M.R.S.A. § 411, sub- §3, as amended, to a planning grant, must include a vote to raise the local share of the construction cost.

2. The 30% planning grant referred to in 38 M.R.S.A. § 411, sub- § 3, as amended, does not apply to "sewage surveys" mentioned in 38 M.R.S.A. § 412.

3. There is no statutory requirement that plans eligible for grants under 38 M.R.S.A. § 411, sub-§3 receive federal approval before the state grant may be made.

FACTS:

You have asked eight questions relating to Me. Public Laws 1969, c. 499, which in Sections 5 through 8 amended 38 M.R.S.A. § 411, the statute relating to State grants for pollution abatement facilities. These questions will be answered in the order in which they were posed.

QUESTION NO. 1:

Section 8 of the reference Public Law in substance provides that the Commission may grant up to 30% of the cost of planning municipal and quasi-municipal pollution abatement construction programs after the governing body of the municipality or quasi-municipal corporation duly votes to proceed with a pollution abatement construction program. Must this local vote include an affirmative vote to raise the local share of the construction cost?

ANSWER NO. 1:

Yes. The legislature appears to have intended that the EIC be assured that the funds which it advances will be supplemented by the local share and that the needed facility for which the funds are advanced will in fact be built. Only a vote to raise the local share of the construction cost can provide such assurance.

QUESTION NO. 2:

Does the 30% grant referred to in Section 8 of the reference Public Law apply to "sewage surveys" as described in 38 M.R.S.A. § 412, as well as detailed planning and engineering costs which are an essential prerequisite to actual construction?

ANSWER NO. 2:

No. 38 M.R.S.A. § 411 is closely linked to the Federal Water Pollution Control Act, 33 USCA § § 466 through 466k, which provides for federal grants to states in aid of pollution abatement efforts. The relevant portion of the federal statute, for our purposes, reads:

> "The Secretary is authorized to make grants to any State . . . for the *construction* of necessary treatment works . . . and for the purposes of *reports, plans and specifications* in connection therewith." 33 USCA § 466e (a) (Emphasis Supplied)

38 M.R.S.A. § 411 and the federal law must be read together in order to accomplish their common purpose. Both statutes contemplate as eligible for grants only detailed planning and engineering costs which form an essential prerequisite to the construction program, and, in the case of the state law, these costs are not eligible for grant monies until after the governing body of the municipality or quasi-municipal corporation duly votes to proceed with a pollution abatement construction program. Pilot plants, feasibility studies, cost estimates and the like, designed to aid such governing body in reaching the decision on whether or not to embark on such a program may be subsidizable by the EIC as "sewage surveys" under and subject to the limitations of 38 M.R.S.A. § 412.

QUESTION NO. 3:

Planning a pollution abatement facility often includes work not considered eligible for the EIC for construction aid. In determining the state's 30% share to be paid to a municipality or quasi-municipal corporation for expenses incurred in planning a pollution abatement construction program under 38 M.R.S.A. § 411(3), should the EIC limit such amount to the cost of items eligible for construction aid?

ANSWER NO. 3:

Determination of the costs eligible for payment under 38 M.R.S.A. § 411(3) is an administrative decision to be made by the EIC. The statute authorizes payment

> " . . . not in excess of 30% of the expense of a municipality or quasi-municipal corporation incurred by it in *planning* a pollution abatement construction program." (Emphasis Supplied)

The question of what constitutes planning costs is peculiarly within the expertise of the EIC to determine, and is a question of fact for administrative decision, rather than one of law for resolution by this office.

Reference should be had to Answer 2, *supra,* concerning the distinction made in Sections 411 and 412 between detailed planning and engineering costs forming an essential prerequisite to the construction program (which are eligible for reimbursement under section 411) and preliminary feasibility studies and the like (which are not eligible for reimbursement under § 411, but may be eligible under section 412).

QUESTION NO. 4:

The federal government makes its own determination of what costs, incurred in planning or constructing a pollution abatement facility, are eligible for federal aid. Often such determination is not made until after completion of final plans. In determining the amount to be paid to a municipality or quasi-municipal corporation under the provisions of 38 M.R.S.A. § 411(2), permitting pre-financing by the EIC of a portion of the federal share of the cost of a pollution abatement construction, may the EIC rely upon existing guidelines and its past experience concerning federal eligibility requirements?

ANSWER NO. 4:

The decision of whether or not to so proceed is administrative in nature and raises no issues of law. However, the EIC should require that, in any event any costs of a program, for which the EIC prefinances the federal share, are later determined by the federal government to be ineligible for federal aid, the municipality or quasi-municipal corporation will reimburse the Environmental Improvement Commission for such ineligible costs. The statute provides for prefinancing "in anticipation of federal reimbursement . . . " for the amount prefinanced. We interpret the statute to mean *full* repayment of such amount, and to require that the EIC prefinance no more than it will eventually receive from the federal government. In view of the uncertainties concerning the method of determining the eventual amount of the federal share, the EIC must be assured that its pay-outs under the statute will not exceed the future income from the federal government.

QUESTION NO. 5:

Consulting engineers base their design fees on a percentage of final construction costs. May the EIC, in determining the amount to be paid to a municipality or quasi-municipal corporation under either the direct planning grants statute, 38 M.R.S.A. § 411(3), or the prefinancing statute, 38 M.R.S.A. § 411 (2), use estimated engineering costs with adjustments after final engineering costs are known?

ANSWER NO. 5:

Such a determination lies wholly within the administrative discretion of the EIC. However, we would caution, as we did in our answer to Question No. 4, that the EIC should require reimbursement by the municipality or quasi-municipal corporation of any monies paid by the EIC which are later determined to have been in excess of those actually required to be paid by the municipality or quasi-municipal corporation as planning or construction costs.

QUESTION NO. 6:

38 M.R.S.A. § 411(3) authorizes the EIC to make direct grants in an amount not in excess of 30% of the expenses of a municipality or quasi-municipal corporation in planning a pollution abatement construction program. Must the plans receive federal approval before the EIC may make the grant?

ANSWER NO. 6:

No. We find no such requirement, either expressly or by implication, in this section.

QUESTION NO. 7:

38 M.R.S.A. § 411(2) authorizes the EIC to make payments not in excess of 30% of the expense of

> " . . . . pollution abatement construction programs which have received federal approval, or for planning such programs, in anticipation of federal reimbursement from federal programs of such amounts . . . "

a. Does this section authorize the EIC to make such a payment in anticipation of future federal reimbursement, for planning?

b. Is federal approval of the program necessary before the EIC may make the payment for planning such program?

c. What constitutes federal approval?

ANSWER NO. 7:

a. Yes. The statute speaks for itself in this regard.

b. No. Obviously a program cannot receive federal approval until it has been adequately planned. To interpret the statute to mean that the program must be approved before it is planned would be anomalous.

c. This question is a matter for administrative determination by the EIC, based on its relationship and experience with the federal government. It may be that the federal

statute defines the criteria for approval. In any event, your question raises no issue of state law cognizable by this office.

QUESTION NO. 8:

Me. Public Laws 1969, c. 499, § 6 states in part:

> " . . . [W]hen the Legislature is not in session, the Governor and Council may authorize the commission to advance planning funds authorized by subsections 2 and 3, not in excess of $50,000 to any one municipality or quasi-municipal corporation."

Does this language mean that under subsection 2, $50,000 could be advanced, and an additional $50,000 could likewise be advanced under subsection 3?

ANSWER NO. 8:

We decline to answer Question No. 8 because it does not appear from the statute that an answer would in any way be of assistance to the EIC in performing its statutory duties. The authorization to the EIC to make the advance would come from the Governor and Council. They would be the only parties called upon to decide the question you have asked.

CROSS REFERENCES

Eligible planning costs, see opinion dated December 12, 1968.

Grants for unspecified "planning" not authorized, see opinion dated October 3, 1968.

ROBERT G. FULLER, JR.
Assistant Attorney General

December 16, 1969
Education

William T. Logan, Jr., Commissioner

SYLLABUS:

The State Board of Education has no jurisdiction or control over the State Principals' Association.

FACTS:

The State Principals' Association is a nonstock corporation organized February 21, 1952 under what is now 13 M.R.S.A. § § 901-986. The purposes set forth in the certificate of organization, which has not been amended, read as follows:

> "To promote the best interests of the secondary schools of Maine; to encourage cooperation, professional efficiency and good fellowship among its members; and to regulate all interscholastic activities in secondary schools."

Apparently prior to 1952 there was an unincorporated association. From 1921 to 1967 a member of the Department of Education served as Executive Secretary. Since 1967 the Association has paid for a full-time Executive Secretary.

It is fair to state that the Department of Education exercises no control over the Association. It is common knowledge that the Association is concerned with so-called

extracurricula activities of public secondary schools.

QUESTIONS:

1. Does the State Board of Education have any jurisdiction and control over the policies and activities of the State Principals' Association?
2. Does this Association have the legal right to operate in accordance with its constitution and bylaws?

ANSWERS:

1. No.
2. Yes.

REASON:

We must look into the statutes to see if any governmental agency is given power to supervise and control this type of corporation. We are constantly aware of governmental supervision or limitation of the activities of corporations. The legislature has the authority to give supervision or some control of private corporations, within well defined limits, to a governmental agency.

We must look at the education laws (20 M.R.S.A.) to see if such a corporation is within the jurisdiction of the State Board of Education. We can find nothing in Title 20, Education, which gives the State Board any jurisdiction or control over extracurricula activities of students in the public schools. As a matter of fact, the statutes appear to contain little or no reference to such activities in the public schools.

Even those sections devoted to the powers and duties of superintendents (20 M.R.S.A. § 161) and school committees (20 M.R.S.A. § 473) do not even hint at the existence of extracurricula activities in public schools.

Lacking any reference to such activities, we must conclude that the first question shall be answered in the negative. The second question, insofar as it relates to jurisdiction and control by the State Board of Education, is answered in the affirmative.

GEORGE C. WEST
Deputy Attorney General

December 16, 1969
Environmental Improvement
Commission

Donaldson Koons, Chairman

Incompatibility of offices

SYLLABUS:

A member of the Environmental Improvement Commission maintaining a private engineering practice, employed by a municipality, and appointed under 38 M.R.S.A. § 361 to represent municipal interests, is not disqualified from serving on the commission, but must disqualify himself from participating in proceedings before the commission which involve his employer or his clients.

FACTS:

An individual has been appointed to the Environmental Improvement Commission to fill one of the two membership positions for municipal interests. 38 M.R.S.A. § 361. The individual maintains a consulting engineering practice and in addition is employed by a municipality as town engineer.

QUESTION:

Is the subject individual disqualified from serving as a member of the Environmental Improvement Commission because of his outside practice and employment?

ANSWER:

No. However, the individual should disqualify himself from voting, as a member of the Commission, on matters involving his clients and his employer.

OPINION:

38 M.R.S.A. § 361 specifically provides that the members of the commission shall represent certain defined interests – manufacturing interests of the State, municipalities, the public and conservation. The commission is charged with numerous regulatory and enforcement powers in the environmental field, any one of which may at some point affect any one of such interests. If an individual was to be disqualified from taking any action as a member of the commission merely because he was appointed to represent a particular interest as the statute envisions, the commission would be paralyzed. We cannot conceive that the legislature intended such a result.

However, in the case of the member under consideration, there may be instances where his employer, or one of his clients, comes within the regulatory or enforcement purview of the commission. In such event a conflict of interest would arise, and the member must disqualify himself from participating in the proceedings.

ROBERT G. FULLER, JR.
Assistant Attorney General

January 8, 1970
Inland Fisheries and Game

C. Keith Miller, Business Manager

Interest on Fish and Game Moneys Deposited with State Treasurer

SYLLABUS:

While moneys received by the Department of Inland Fisheries and Game may be used in payment of rent for office space, interest earned on funds of the department invested by the State Treasurer must, in accordance with 5 M.R.S.A. § 135, be credited to the General Fund and may not be used in payment of such rent.

FACTS:

The Department of Inland Fisheries and Game has for a long period of time maintained a large cash balance of special revenue funds on deposit with the State Treasurer which has been invested by the Treasurer in accordance with law and has earned a sizeable amount of interest each year. Under the provisions of 5 M.R.S.A. § 135, this interest has been credited to the General Fund of the State. The department has been advised that, effective January 1, 1970, it will be charged rent for the space used by it in the State Office Building. It had previously been understood that the above-referred-to interest, being so credited, served as a substitute for the rental fee for such space.

QUESTION:

May the interest earned on department funds deposited with the Treasurer and invested by him in accordance with 5 M.R.S.A. § 135 be used by the department to pay for rental of office space?

ANSWER:

No.

REASON:

Moneys received by the department are for the use of the department and are deposited with the State Treasurer in a special revenue account. From these receipts the Legislature, by P. & S. L. 1969, Ch. 143, has allocated certain amounts for departmental operations which may include rent of office space.

When, however, there are excess moneys in the Treasury not needed to meet current obligations, 5 M.R.S.A. § 135 provides that the Treasurer may invest such moneys and that "interest earned on such investments shall be credited to the respective funds, except that interest earned on investments of special revenue funds shall be credited to the General Fund of the State."

It follows from the above that while moneys received by the department may be used in payment of rent for office space, interest earned on funds of the department invested by the Treasurer in accordance with 5 M.R.S.A. § 135, must be credited to the General Fund and may not be used in payment of such rent.

LEON V. WALKER, JR.
Assistant Attorney General

January 9, 1970

Ernest H. Johnson, State Tax Assessor

Bureau of Taxation

National Banks

SYLLABUS:

IN VIEW OF H.R. 7491, MAINE IS PRECLUDED FROM IMPOSING A CORPORATE INCOME TAX AGAINST NATIONAL BANKS SINCE MAINE NOW LEVIES A BANK STOCK TAX AGAINST THEIR CAPITAL STOCK. FURTHER, THE

REPEAL OF THE BANK STOCK TAX WOULD NOT AUTOMATICALLY SUBJECT NATIONAL BANKS TO THE MAINE CORPORATE INCOME TAX LAW. AFFIRMATIVE LEGISLATIVE ACTION IS NECESSARY.

FACTS:

On December 24, 1969 H.R. 7491 was enacted into law. The intent of this federal legislation was to liberalize state taxation of national banks by amending 12 U.S.C.A. § 548. The pertinent parts of § 548 and the amendments thereto are as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with: 1. (a) The imposition by any State of any one of the above four forms of taxation *shall be in lieu of the others,* except as hereinafter provided in subdivision (c) of this clause." (emphasis supplied) 12 U.S.C.A. § 548.

" . . . That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations." 12 U.S.C.A. § 548 (c).

"Section 5219 of the Revised Statutes (12 U.S.C. 548) is amended by adding at the end thereof the following: In addition to the other methods of taxation authorized by the foregoing provisions of this section and subject to the limitations and restrictions specifically set forth in such provisions, a State or political subdivision thereof may impose any tax which is imposed generally on a nondiscriminatory basis throughout the jurisdiction of such State or political subdivision (other than a tax on intangible personal property) on a national bank having its principal office within such State in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such State." H.R. 7491 § 1 (a) (5) (a).

"The amendment made by subsection (a) of this section, shall be effective from the date of enactment of this Act until the effective date of the amendment made by section 2(a) of this Act." H.R. 7491 § 1 (b).

"Except as provided in subsection (b) of this section, prior to January 1, 1972, no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act." H.R. 7491 § 3 (a) (2).

Pursuant to 36 M.R.S.A. § 4751-4754, Maine now levies a Bank Stock Tax against the capital stock of National Banks.

QUESTIONS:

1. Since Maine now levies a Bank Stock Tax against the capital stock of national banks, does this preclude the imposition of the Maine corporate income tax against

national banks, in view of the liberalization of the federal statute?

2. If the answer to question No. 1 is in the affirmative, then would the repeal of the Bank Stock Tax automatically subject national banks to the Maine Corporate Income Tax Law?

ANSWERS:

1. Yes.
2. No.

REASONS:

1. Section 1 of H.R. 7491 permits, for the period between the date of enactment and January 1, 1972, the imposition of any new tax on national banks. However, the "limitations and restrictions" which are specifically set forth in 12 U.S.C.A. ◊ 548 (1) are incorporated by reference into section 1 of H.R. 7491. Thus, a choice must be made between the Bank Stock Tax and the Maine corporate income tax. It should be noted that § 548 (c) permits Maine to impose an individual income tax, in addition to the corporate income tax, upon dividends received by Maine shareholders from national banks.

2. The repeal of the Bank Stock Tax would not automatically subject National Banks to the Maine Corporate Income tax. Section 3 (a) (2) of H.R. 7491 is a saving provision which permits a legislature, by affirmative action, to impose a new tax, ie: the Maine corporate income tax. However, the Bank Stock Tax would have to be repealed. Section 3 (a) (2) states in part:

> " . . . prior to January 1, 1972, no tax may be imposed on any class of banks by or under authority of any state legislation in effect prior to the enactment of this Act unless the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act."

WENDELL R. DAVIDSON
Assistant Attorney General

January 12, 1970
Environmental Improvement Comm.

William R. Adams, Director

License requirements – private outfalls; municipal sewers

SYLLABUS:

A municipality need not apply for a waste discharge license under 38 M.R.S.A. §413 where it proposes only to collect and discharge, through a municipal sewer, sewage in like quantity as was previously discharged through privately owned outfalls. 1961-62 Ops. Attorney General 162 reaffirmed.

FACTS:

For an unspecified number of years prior to 1965, but at least as far back as September 1, 1959 sewage from a number of buildings was discharged through six

privately owned outfalls to tidal waters. In 1965 the municipality in which the buildings are located acquired the land between the buildings and the tidal waters and constructed a sewer line to which the private outfalls were connected. The municipality does not treat the sewage prior to its entry into the tidal waters.

The classification of the tidal waters at the point of discharge was, in 1965, SC. 38 M.R.S.A. § 370 (1964) – *Lincoln County,* 916, sub- § B. In 1967 the classification was raised to SB-2 Me. Public Laws 1967, c. 324, § 24. An individual proposes purchasing one of the subject buildings.

QUESTIONS:

1. If the individual purchases the building, must he apply for a waste discharge license?
2. Should the town have applied for a waste discharge license in 1965, and should it apply for one now?

ANSWERS:

1. No.
2. No, in either case, unless the amount of sewage discharged, or the composition of the discharge, has changed so as to constitute a "new source of pollution" within the meaning of 38 M.R.S.A. § 413.

REASON:

1. Since the sewage from the building does not enter the tidal waters through a private outfall, but rather through a sewer line owned and maintained by the municipality, the owner of the building and his successors in title need no discharge license. 1961-62 Ops. Attorney General 162.
2. 38 M.R.S.A. § 413, as amended, provides in pertinent part:

> "No . . . municipality . . . shall discharge into any . . . tidal waters . . . any sewage so as to constitute a *new source of pollution to said waters* without first obtaining a license from the commission." (Emphasis supplied.)

We assume from the facts supplied that the sewage discharge from the private outfalls has remained at substantially the same volume at all times pertinent hereto. Accordingly, such discharge does not constitute a "new source of pollution" to the receiving body of water within the meaning of Section 413. It is rather an existing source of pollution which is finding its way to the waters in a new manner.

Any increase in the amount of sewage discharged, any connection to the municipal sewers of new sources of sewage (as, for example, a newly constructed house), or any change in the composition of the discharge which would, unless treated, violate the existing SC classification of the receiving waters, would constitute a "new source of pollution" and would necessitate application by the municipality for a license. *Cf.* opinion of this office dated December 29, 1967.

ROBERT G. FULLER, JR.
Assistant Attorney General

January 14, 1970
Bureau of Taxation

Ernest H. Johnson, State Tax Assessor

Liability of National Banks for Sales and Use Taxes

SYLLABUS:

FOLLOWING THE ENACTMENT INTO LAW OF H.R. 7491 ON DECEMBER 24, 1969, NATIONAL BANKS ARE AUTOMATICALLY SUBJECT TO MAINE SALES AND USE TAX LAW.

FACTS:

The United States Supreme Court held in *First Agricultural National Bank v. State Tax Com'n.*, 88 S. Ct. 2173 (1968) that national banks are immune from state sales and use taxes. On December 24, 1969 H.R. 7491 was enacted into law. The intent of this federal legislation was to liberalize state taxation of national banks by amending 12 U.S.C.A. § 548. Section 3 (b) (1) of H.R. 7491, which section is titled "Saving provision", reads:

> "The prohibition of subsection (a) of this section does not apply to any sales tax or use tax complementary thereto . . . "

Section 1 (a) (5) (c) of H.R. 7491 reads:

> "No sales tax or use tax complementary thereto shall be imposed pursuant to this paragraph 5 upon purchases, sales, and use within the taxing jurisdiction of tangible personal property which is the subject matter of a written contract of purchase entered into by a national bank prior to September 1, 1969."

QUESTION:

Are national banks automatically subject to Maine sales and use taxes in the light of H.R. 7491?

ANSWER:

Yes.

REASONS:

Section 3 (b) (1) of H.R. 7491 is a "Saving provision" which automatically subjects national banks to Maine sales and use taxes. Affirmative action by the Maine legislature is unnecessary. However, it should be noted that pursuant to § 1 (a) (5) (c) of H.R. 7491 sales or use taxes may not be imposed upon the sale or use of " . . . tangible personal property which is the subject matter of a written contract of purchase entered into by a national bank prior to September 1, 1969."

WENDELL R. DAVIDSON
Assistant Attorney General

January 26, 1970
Executive Council

Kenneth D. Robinson, Chairman

Compensation and Expense of Executive Council

SYLLABUS:

Each member of the Executive Council shall receive the same compensation and travel allowance as a Representative to the Legislature, for services as a Councilor during the regular session of the Legislature. For services at other sessions of the Council, each member thereof shall receive $20. for each meeting and actual expenses. 1945-46 Attorney General Rep. 108 and 1959-60 Attorney General Rep. 110 reaffirmed.

FACTS AND QUESTIONS:

By letter dated January 21, 1970 you have asked the following questions:

To what pay and allowances are the members of the Executive Council entitled in the following circumstances?

1. Legislature in regular session.
2. Legislature in special session.
3. Legislature not in session.
4. Committee meetings of the Council – Council not in session.

ANSWERS AND REASONS:

1. When the Legislature is in regular session, each Councilor is entitled to receive the same compensation and travel allowance as a representative to the Legislature, 2 M.R.S.A. § 51. The amount of compensation and travel allowances payable to a Representative to the Legislature is found at 3 M.R.S.A. § 2.

2. When the Legislature is in special session, each Councilor is entitled to receive $20. for each session and actual expenses. 2 M.R.S.A. § 51; see also 1945-46 Attorney General Rep. 108, where we stated:

> " . . . . the provision for the same compensation as a Representative to the Legislature . . . . does not apply to special sessions of the Legislature."

This view was reaffirmed in 1960, where we stated:

> " . . . . (I)t is our opinion that the Executive Council is now in session at the call of the Governor and not simply because the Legislature has convened in Special Session. Therefore, they should receive twenty dollars ($20.00) per day and actual expenses . . .
>
> "There is no statute or constitutional provision stating that they shall be in session while the Legislature is in Special Session."

3. When the Legislature is not in session, each Councilor is entitled to receive $20. for each session and actual expenses. 2 M.R.S.A. § 51.

The $20-plus-actual-expense limitation applies to *all* sessions of the Council other than sessions held during the regular session of the Legislature. 2 M.R.S.A. § 51.

4. For authorized services on committees when the Council is not in session, each Councilor is entitled to receive $5. a day and actual expenses. 2 M.R.S.A. § 51.

ROBERT G. FULLER, JR.
Assistant Attorney General

February 2, 1970
Member, Board for Licensing Hearing
Aid Dealers and Fitters

Henry R. Tobin

Practices Subject to Licensure Under 32 M.R.S.A. Chapter 23-A – Hearing Aid Dealers and Fitters

SYLLABUS:

A person who in the process of administering hearing aid evaluation and testing, utilizing a hearing aid, determines the performance of such aid with respect to its capacity to compensate for the lack of hearing acuity of an individual, and following such determination recommends a particular hearing aid as being satisfactory for such individual's use is clearly demonstrating and fitting hearing aids, both being controlled by 32 M.R.S.A. Chapter 23-A, P.L. 1969, Chapter 320, requiring that the person making such determination and recommendation be licensed under such statute.

FACTS:

This office has been advised by a Member of the Board for Licensing Hearing Aid Dealers and Fitters that at a particular speech and hearing center, personnel of such center are involved in the practice of testing hearing acuity of individuals, and that in such process such personnel following an evaluation and testing, place upon the person of individuals tested, a hearing aid for the purpose of determining the capacity of such instrument to compensate for the lack of hearing acuity of such individual. Following such procedure such personnel recommend to the individuals tested that they obtain a certain hearing aid or hearing aids in the alternative, such instrument or instruments being considered by such personnel to be satisfactory for use by the tested individuals.

QUESTION:

Is the practice described in the facts an activity or procedure controlled by 32 M.R.S.A. Chapter 23-A and thus, subject to licensure thereunder?

ANSWER:

Yes.

REASON:

32 M.R.S.A. § 1658, sub § 5, provides as follows:

" 'Practice of fitting and dealing in hearing aids' shall mean the measurement of human hearing by means of an audiometer or by any means solely for the purpose of making selections, adaptions or sale of hearing aids. The term includes the making of impressions for earmolds. A dealer, at the request of a physician or a member of related professions, may make audiograms for the professional's use in consultation with the hard-of-hearing."

32 M.R.S.A. § 1658-C provides as follows:

"This chapter is not intended to prevent any person from engaging in the practice of measuring human hearing; such person, however, shall not demonstrate or offer for sale hearing aids and accessories.

"This chapter does not apply to a person who is a physician or osteopath duly licensed under the laws of the State of Maine."

Under the facts given it is the opinion of this office that the described practice of placing a hearing aid upon the person of an individual, whose hearing acuity is being tested, for the purpose of determining the performance of such instrument and following which, recommendation is made that the tested individual obtain a particular hearing aid is the practice of "selection" of a hearing aid for an individual and thus, falls within the definition of the practice of fitting, controlled by the first above cited provision. It is further the opinion of this office that the practice of determining the performance of a particular hearing aid, followed by recommendation as described in the facts is a method of demonstrating hearing aids forbidden by the second above cited provision, unless the person demonstrating the hearing aid is licensed.

32 M.R.S.A. Chapter 23-A is designed to control practices of the type giving rise to the question here under consideration. Once the described practices are completed with respect to an individual, the licensed hearing aid dealer with respect to the individual entering his place of business for the purpose of purchase, is reduced to the level of a retail clerk making a sale without the exercise of judgment or skill for which he is licensed, all of the determinations subject to licensure under the statute are completed by personnel of the hearing and speech center. Such practices fly in the teeth of 32 M.R.S.A. Chapter 23-A and are violative of that Chapter.

Personnel appearing in speech centers involved in practices described in the facts are clearly subject to licensure under Chapter 23-A, and should be advised by the Board for Licensing Hearing Aid Dealers and Fitters to comply with the licensing provisions.

Reference was made in the memorandum received by this office giving rise to this opinion to the fact that the hearing and speech center does not utilize all types of hearing aids in its evaluation and testing process. It is considered unnecessary for us to comment in respect to such fact, further than to say, in view of the result which we reach in this opinion, i.e., the personnel of the hearing and speech center engaged in practices described in the facts are subject to licensure, such fact becomes irrelevant since hearing aid dealers and fitters are free to utilize instruments of their choice.

COURTLAND D. PERRY
Assistant Attorney General

February 3, 1970
Forestry

Austin H. Wilkins, Commissioner

Executive Director – Maine Land Use Regulation Commission

SYLLABUS:

The position of Executive Director of the Maine Land Use Regulation Commission falls within the classified service.

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.

REASONS:

The Real Estate Transfers Law provides in pertinent part:

"There is imposed, on each deed, instrument or writing by which any lands, tenements or other realty *sold* . . . a tax . . . ." (Emphasis supplied) 36 M.R.S.A. §4651.

We read the above statutory language to mean that in order for the real estate transfer tax to be effective there must be a sale of lands, tenements or other realty. The facts furnished by the attorney for the corporation clearly indicate there was no sale. The deeds were given as a distribution of capital assets. The fact that in one instance the value of the property distributed was $2,000 more than the distributive share of one shareholder was offset by the shareholder replacing $2,000 in the capital account of the corporation. In no instance was there a sale by the corporation and therefore no tax is imposed under the Real Estate Transfers Law.

JEROME S. MATUS
Assistant Attorney General

February 23, 1970
Real Estate Commission

Leo Carignan, Executive Secretary

SYLLABUS:

An auctioneer, engaged in the sale of real estate in Maine for the Small Business Administration must be licensed by the Maine State Real Estate Commission.

FACTS:

The Small Business Administration, a federal agency, has engaged a private auctioneer in this State to sell real estate for it. The auctioneer so engaged is not licensed by this State as a real estate broker or salesman.

QUESTION:

Is an auctioneer under the above circumstances required to be licensed in this State?

ANSWER:

Yes.

OPINION:

In general, any person, firm, partnership, association or corporation that offers real estate for sale for others, as a partial or whole vocation, falls within the definition as a real estate broker. 32 M.R.S.A. § 4001.

Since auctioning real estate has been classified by Opinion of the Attorney General, dated June 29, 1956, as an activity requiring a license, the subject auctioneer must meet this requirement unless there are special circumstances that would remove him from

these license provisions. The fact that the auctioneer is engaged by the Small Business Administration is of no relevant significance.

The exemptions from the licensing sections under 32 M.R.S.A. § 4001, sub-section 3 include:

> ". . . any person, partnership, association or corporation who as owner or lessor shall perform any of such acts . . . or . . . the regular employees thereof . . . where such acts are performed in the regular course of, or as an incident to the management of such property . . . ."

Since the auctioneer is not a regular employee performing these acts as an incident to the management of the subject property he would not qualify for this state exemption.

Counsel for the Small Business Administration has argued that the auctioneer is exempt from our State laws because his commission is paid by the Administration.

It is apparent that an independent auctioneer is not an authorized agent of the Small Business Administration, within the meaning of the following language from the Small Business Act:

> "The Administrator is authorized, subject to the civil service and classification laws, to select, employ, appoint, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary to carry out the provisions of this Act; . . . " 15 USCA § 624(a)

Whether or not an agent of the administration would be exempt from our real estate laws we need not now decide.

In conclusion, if an auctioneer is engaged in an activity that requires a license from the Maine Real Estate Commission he does not become exempt from the license requirements merely because he is auctioning property owned by the Small Business Administration.

CLAYTON N. HOWARD
Assistant Attorney General

February 26, 1970
Legislative Finance Office

Samuel A. Hinds,
Assistant Finance Officer

Per diem allowance for Interim Legislative Investigating Committee

SYLLABUS:

Members of an Interim Legislative Investigating Committee may not receive a per diem allowance unless specific provision is made therefor in order creating the committee.

FACTS:

An Interim Legislative Investigating Committee was created by a joint order (S.P. 633) of the Special Session of the 104th Legislature to investigate certain aspects of the Maine Industrial Building Authority and Maine Sugar Industries. No provision is made in the order for compensation or expenses of members of the committee.

QUESTIONS:

1. Can the State Controller pay a per diem amount to members of the reference committee?
2. Is it proper for members of the committee to vote themselves a per diem amount?

ANSWERS:

Members of the Interim Legislative Investigating Committee may not receive a per diem amount of compensation but may receive their expenses.

REASONS:

The compensation of members of the Legislature is controlled both by the Constitution and by statute.

The Constitution of Maine, Article IV, Part Third, Section 7 provides:

> "The Senators and Representatives shall receive such compensation, as shall be established by law; but no law increasing their compensation shall take effect during the existence of the Legislature, which enacted it. The expenses of the Members of the House of Representatives in traveling to the Legislature, and returning therefrom, once in each week of each session and no more, shall be paid by the State out of the public treasury to every member, who shall seasonably attend, in the judgment of the House, and does not depart therefrom without leave."

The thrust of the constitutional provision is that compensation of members of the Legislature shall be that established by law. The pertinent statutory provisions are Title 3 M.R.S.A. § § 2 and 3. Section 2 provides for a salary for members of the Legislature for regular session, together with their expenses, and in addition, provides a per diem amount for special sessions of the Legislature.

Section 3 provides:

> "The President of the Senate, the Speaker of the House of Representatives, the floor leaders and their assistants may meet when the Legislature is not in session at any convenient location within the State to arrange for legislative activities. They shall be reimbursed for their actual expenses with the exception of mileage which shall be paid at the same rate received by state employees.
>
> *"The expenses of members of joint interim committees meeting within the State shall be reimbursed as provided in the preceding paragraph within the limitation of the committee appropriation.* The expenses of members of the Legislature, excepting members of the Legislative Research Committee on committee duties, traveling outside the State shall be reimbursed as provided in the preceding paragraph, provided that the expense vouchers are approved by the President of the Senate or the Speaker of the House of Representatives." (Emphasis supplied)

The reference committee is a "joint interim committee" by its creation and by the terms of the order.

There is no specific provision contained in the statutes for a per diem amount of compensation for members of the Legislature serving on joint interim committees. The only provision is that of section 3 supra providing that the *expenses* of members of such a committee shall be reimbursed. (Compare, however, Title 3 M.R.S.A.§163, subsection 14 clearly providing for a per diem compensation to members of the Legislative Research

Committee.)

The general rule articulated by legal encyclopedias is that a legislator's right to compensation arises as an incident of his office and is controlled by constitutional and statutory provisions. It has also been held that members of a legislative committee are not entitled to a per diem amount for services rendered after adjournment even when they may be so entitled during the session. The basis of the rule is that the Legislature may properly fix, if it deems it necessary, the amount of any compensation. See 81 C.J.S., *States*, Sec. 36.

In the absence of a legislative declaration of payment of per diem, it is our opinion that members of the committee may receive only their expenses.

We are of the opinion that they may not vote themselves a per diem amount of compensation. Cf. *Opinion of the Justices*, (1953) 148 Me. 528, 96 A.2d 749; *Opinion of the Justices*, (1957) 152 Me. 302; 140 A.2d 762 and *Opinion of the Justices* (1963) 159 Me. 77, 190 A.2d 910.

JON R. DOYLE
Assistant Attorney General

March 17, 1970

Charles F. Trumbull, Member of the
Executive Council

Jurisdiction of Governor and Council to Authorize Transfer of Funds from Bond Issue Account to General Fund Appropriation Account.

SYLLABUS:

The Governor and Council are without jurisdiction to authorize the transfer of funds from a Bond Issue Account to a General Fund Appropriation Account.

FACTS:

There is pending before the Governor and Council a Council Order proposed to authorize the transfer of funds from a Bond Issue Account of the Department of Mental Health and Corrections, viz., General Fire Prevention and Safety Projects $100,000, enacted by the 104th Legislature by P&SL 1969, Chapter 194, ratified by the electorate, to a General Fund Appropriation Account of the Augusta State Hospital, viz., Fire Prevention and Safety Projects $42,000, enacted by the 103rd Legislature in Special Session, P&SL 1967, Chapter 191, Part B.

QUESTION:

May the Governor and Council properly and legally transfer funds from a Bond Issue Account to a General Fund Appropriation Account?

ANSWER:

No.

REASON:

This office by Opinion dated November 17, 1969 addressed itself to a similar issue, wherein a converse transfer was in question, i.e., a transfer from a General Fund Appropriation Account to a Bond Issue Account. The statute relied upon in that Opinion, resulting in a negative ruling, was 5 M.R.S.A. §1585, the same statute is applicable here and is controlling. This section is the only pertinent legislative authority relative to Governor and Council transfer of funds between accounts. We reach the same result in this instance for the same reason. The statute in question permits transfer between appropriation accounts. The transfer requested to be authorized, in this instance, is from a Bond Issue Account to an Appropriation Account. A Bond Issue Account results from an enactment of the Legislature, ratified by the people. An account of this nature is neither mentioned nor contemplated in section 1585, and is, in our opinion, not an Appropriation Account, which arises from an enactment of the Legislature, and relates to General Fund Surplus over which the Legislature has authority. We conclude that the Governor and Council can not authorize transfer of funds from a Bond Issue Account to an Appropriation Account.

COURTLAND D. PERRY
Assistant Attorney General

March 27, 1970
Mental Health & Corrections

K. B. Burns, Director
Bureau of Business Management

Transfer of Funds Between General Fire Prevention and Safety Projects Item and Institutional Fire Prevention and Safety Projects Items Contained in Bond Issue P&SL 1969, Chapter 194

SYLLABUS:

The Governor and Executive Council have authority to transfer funds from item designated "General Fire Prevention and Safety Projects" to Fire Prevention and Safety Projects designated by institutional name, unrestricted by 5% individual project restriction pursuant to P&SL 1969, Chapter 194.

FACTS:

The Department of Mental Health and Corrections has requested passage of a Council Order permitting the sum of $10,600 to be transferred from item designated "General Fire Prevention and Safety Projects $100,000" to item designated "Augusta State Hospital Fire Prevention and Safety Project $63,000." One of the members of the Executive Council has requested that the Director of the Bureau of Business Management of the Department of Mental Health and Corrections, obtain the opinion of this office as to the legality of such transfer.

QUESTION:

Under P&SL 1969, Chapter 194, have the Governor and Council authority to transfer

the sum of $10,600 from item designated "General Fire Prevention and Safety Projects $100,000" to item designated "Augusta State Hospital Fire Prevention and Safety Project $63,000"?

ANSWER:

Yes.

REASON:

Pertinent language of P&SL 1969, Chapter 194, bearing upon our Opinion in this matter is as follows:

> "The amounts listed after each project are to be construed as guides and any one or more amounts may be exceeded with the approval of the Governor and Council as long as the total expenditures of state money do not exceed the total amount of the bond issue allocated for all projects. The amount transferred from one project to another shall not exceed 5% of the amount listed and no one project shall be reduced by more than 5%."

We construe the above quoted language to authorize the Governor and Council to transfer funds between project items designated in the Bond Issue Act. The issue here is whether the 5% restriction set forth is applicable to the General Fire Prevention and Safety item. We find a legislative intent by enactment of the general item, to make available an amount sufficient to supplement possible cost changes arising in the course of carrying out individual institutional fire prevention and safety projects designated in the Bond Issue Act, e.g., Augusta State Hospital.

It is clear that the Governor and Council are subject to the 5% restriction set forth in the above quoted language with respect to transfers between individual institutional projects, since the word "project" is contained within the restrictive language. However, if the general item for fire prevention and safety projects, carrying a fund of $100,000 is to be effectively available for what appears to be its clearly intended purpose, and since this item encompasses multiple "projects", it is our Opinion that the 5% restriction above cited is only on individual fire prevention and safety projects. If we were to find otherwise, and thus construe the 5% restriction to be applicable to the general $100,000 item, the transfer of the sum of $5,000 would be the limit of authorized fund transfer, leaving the sum of $95,000 unreachable and unusable. Even if we were to say that 5% of the $100,000 could be transferred to individual projects, and there are eight individual institutional fire prevention and safety project items, the total authorized would be only $40,000, leaving $60,000 unreachable and unusable. We cannot attach this meaning to the above quoted language. The legislature cannot be said to have intended this absurd result.

It is, therefore, our Opinion that the Governor and Council are vested with transfer authority with respect to items funded within the Bond Issue Act in question, that the $100,000 general item is clearly intended as a supplementary fund, and that the only reasonable construction consistent with legislative intent is that the $100,000 general item is not subject to transfers limited to 5% of the fund; the sum of $10,600 may be transferred with the approval of the Governor and Council from the $100,000 General Fire Prevention and Safety Projects item to the Augusta State Hospital Fire Prevention and Safety Project item.

COURTLAND D. PERRY
Assistant Attorney General

April 8, 1970
Maine State Retirement System

E. L. Walter, Ex. Secretary

Increases in Maine State Retirement System Contributions

SYLLABUS:

The Board of Trustees of the Maine State Retirement System cannot increase contributions, under the provisions of 5 M.R.S.A. § 1095, following a decrease in contributions.

FACTS:

The Maine State Retirement System has asked the Attorney General for an opinion as to whether or not the System's Board of Trustees can increase required contributions under the provisions of 5 M.R.S.A. § 1095 where said Board has earlier reduced or eliminated additional contributions.

QUESTION:

Whether or not the Board of Trustees of the Maine State Retirement System can increase required contributions under the provisions of 5 M.R.S.A. § 1095, after having decreased contributions?

ANSWER:

No.

REASONS:

5 M.R.S.A. § 1095 reads in part as follows:

> "Each member shall, after July 1, 1955, make a 5% contribution of earnable compensation to the retirement system as long as he is employed, any excess of contributions that have ever been made shall be used to increase the retirement allowance or may be refunded at point of retirement. After January 1, 1970, each such member shall make an additional contribution of 1.14% of earnable compensation. Should the actuary determine that all or part of said additional contributions are not required, the board of trustees, upon the recommendation of the actuary, has the right to *reduce or eliminate* such additional contributions." (Emphasis supplied).

The statute is clear that the Board of Trustees may *reduce* or *eliminate* additional required contributions. It is silent on whether or not said Board may *increase* those contributions (assuming that the Board had earlier reduced or eliminated additional contributions.) Since the only powers the Board has are derived by statute, and since the statute in question is silent on contribution *increases,* the Board does not have this power and may not *increase* required contributions, once they are decreased.

This conclusion is buttressed by an examination of 5 M.R.S.A. § 1062 sub § 6B and sub § 7C, which read in part as follows:

> "6 B. . . . . Should the actuary determine that this fund is larger than necessary

to meet obligations, the board of trustees shall have the right to *reduce* the rate of contribution. The board of trustees shall have the right to *increase* the rate of contribution after a reduction has been made, but shall not *increase* said rate to more than ¼ of 1%." (Emphasis supplied).

"7 C. Should the actuary determine that this fund is larger than necessary to meet obligations, the board of trustees shall also have the right to *increase* the rate of contribution after a reduction has been made but shall not *increase* said rate to more than ½ of 1%." (Emphasis supplied.)

In §1062 the Legislature saw fit to spell out the power of the Board to *increase* as well as to *decrease* contributions. Since it did not do so in § 1095, no such power exists and cannot be exercised.

WARREN E. WINSLOW, JR.
Assistant Attorney General

May 29, 1970
Employment Security Commission

James C. Schoenthaler, Chairman

SYLLABUS:

The administration of the Employment Security Law is the responsibility of a majority of the commissioners and not the responsibility of any one individual commissioner.

FACTS:

Recently it has been believed that the three man Employment Security Commission is a cumbersome method of administering that agency. To that end an attempt has been made to have two members agree that the complete administration of the agency be placed in the hands of the chairman. This attempt has not been successful.

QUESTIONS:

1. When the Maine Employment Security Law says "it shall be the duty of the commission to administer this chapter," does the word commission mean three Commissioners individually or does it mean the single majority voice of the three Commissioners?
2. Can the Commission delegate power and authority as it deems reasonable and proper for the effective administration of the law?
3. Does the law permit individual Commissioners, as individuals, to exercise authority, control or direction over agency personnel or is each Commissioner bound by the organizational structure and methods of procedure determined by the majority voice of the three Commissioners?

ANSWERS:

1. Majority of the Commissioners.
2. Within limits it may delegate power and authority.
3. Same as 1.

REASONS:

It is indeed unfortunate that in writing laws more care and thought cannot be given to the language used. In 26 M.R.S.A., Chapter 13, the word "commission" is used frequently. It is defined in §1043, subsection 7, as "the Employment Security Commission." The Maine Employment Security Commission consists of 3 members. 26 M.R.S.A.§1081. It would seem from these 2 sections that the word "commission" refers to the 3 persons who are appointed by the Governor. However, a reading of Chapter 13 shows that such is not the case. The word may also refer to the whole agency. For examples, see second sentence § 1044, subsection 2, "any proceeding before the commission"; in most instances when used in §1193;§1221 in several places as subsection 3, A, 6, and 7; and § 1222. There may be other examples.

The Chairman of the Commission is asking the meaning of the word "commission" in the first sentence of 26 M.R.S.A. § 1082, subsection 1. The sentence reads,

"It shall be the duty of the commission to administer this chapter."

In this sentence the word "commission" refers to the 3 members appointed by the Governor in accordance with §1081 subsection 1. The "commission" acts by a majority vote. This is stated in 1 M.R.S.A. § 71, subsection 3:

"Words giving authority to 3 or more persons authorize a majority to act, when the enactment does not otherwise determine."

26 M.R.S.A. Chapter 13, does not "otherwise determine." In fact, the language of §1081, subsection 3, confirms the general rule.

The Commission is authorized to delegate some of its powers and duties to subordinates.§1082, subsection 4, note particularly the second sentence:

"The commission may delegate to any such person so appointed such power and authority as it deems reasonable and proper for the effective administration of this chapter, and . . . ."

The answer to the third question is the same as the answer to number 1. The commission acts by a majority of its members. Allowing 3 commissioners to each go his own way could soon result in utter chaos.

GEORGE C. WEST
Deputy Attorney General

May 29, 1970
Environmental Improvement Comm.

George C. Gormley, Supervising Engineer

State grants to federally funded construction

SYLLABUS:

1. Title 38 M.R.S.A. § 411 (1) requires some federal funding in order than municipal pollution abatement facilities may qualify for State grants.

2. Title 38 M.R.S.A.§411 (2) is read without reference to§411 (1) requirements regarding federal funding, but contains its own prerequisite that State advancement must be in anticipation of federal reimbursement.

FACTS:

Title 38 M.R.S.A.§411 (1) (1964) authorizes State contribution to municipal

pollution abatement construction programs which have received "federal approval and federal funds for construction". Such State funding is up to a maximum of 35%.

Section 411 (2) further authorizes State advances to municipal programs when construction programs have received federal approval, but only in anticipation of reimbursement from federal programs of said amounts.

QUESTION:

1. How much federal funding must a construction project receive under section 411 (1) in order to qualify for State assistance?

2. Does the requirement of federal approval and funding apply also to the advancement provision of section 411 (2)?

ANSWER:

1. Any amount.
2. No.

REASONING:

1. The language in 411 (1) is permissive. That is, there is no absolute requirement on the State of Maine that it fund any municipal pollution treatment facility. The specific language says that "the Commission is authorized to pay an amount not in excess of 30% of the expense" of a pollution abatement facility. Clearly, the Commission need not necessarily make a grant under § 411 (1) even if the facility acquires federal approval and funds. If the Environmental Improvement Commission determines that circumstances warrant such a grant, it may award aid in an amount up to 30% of the cost. This leaves the Environmental Improvement Commission with a great deal of flexibility in making grants to qualified facilities.

The same kind of flexibility is available to the Secretary of the Interior under the Federal Water Pollution Control Act, 33 U.S.C.A.§466e as amended. The Secretary is authorized to make construction grants to municipal facilities in amounts up to 50%. However, even if a facility meets federal criteria, the Secretary of the Interior may make grants in lesser amounts.

The intent of § 411 (1) appears to be to provide the same kind of flexibility to the Environmental Improvement Commission that the Secretary of the Interior enjoys. Merely because a facility qualifies for federal aid does not mean that the Environmental Improvement Commission is compelled to give funds. It may exercise its judgment as to the amount granted. The answer to your question then is that any federal funding is sufficient to qualify for State assistance. Under no circumstances is the Environmental Improvement Commission required to make a grant under § 411 (1).

2. Section 411 (2) is a separate section by virtue of the initial phrase "Notwithstanding and in addition to subsections 1 and 3". Subsection 411 (2) goes on further to state the conditions under which advancements are made. The conditions are federal approval and federal "reimbursement". The requirements of § 411 (1) regarding "federal funding" do not apply.

This interpretation is confirmed by a reading of the Federal Water Quality Act, 33 U.S.C.A. § 466, as amended, which provides that some projects not receiving federal funding or only partial funding may qualify for reimbursement.

It is also apparent in § 411 (2) that there need be no guarantee of federal

reimbursement prior to such advancement. Language in subsection (2) confirms this when it says that such aid is to be made "in anticipation of reimbursement". More conditional language is found in sub (2) requiring federal funds to go to the State Treasurer "in the event that any federal program reimburses the State". The conclusion is that subsections 411 (1) and 411 (2) must be read without reference to each other.

JOHN M. R. PATERSON
Assistant Attorney General

May 29, 1970
State

Joseph T. Edgar, Secretary of State

SYLLABUS:

A sticker may contain more than the name of one candidate provided the names are so spaced as to appear opposite the squares in which the check mark or cross must be placed.

FACTS:

In the city of Portland each party is entitled to nominate 11 candidates for Representative to the Legislature. The Republican Party has only five candidates who filed nomination papers and will appear on the printed ballot. A campaign is being inaugurated to have six additional candidates on the ballot as write-in candidates. The group sponsoring this movement wishes to make one sticker which will contain the names and residences of six candidates.

QUESTION:

Is it legal for a group of write-in candidates in the coming Primary Election to have printed stickers to be pasted on the ballots listing the names and residences of the entire group of candidates all on the one sticker, or must each candidate provide a separate sticker for his own particular candidacy?

ANSWER:

Yes, it is legal to use one sticker with several names.

REASON:

21 M.R.S.A.§701 states what must appear on a Primary Election ballot. Subsection 2 D of that section reads as follows:

> "Space for write-ins. At the end of the list of candidates for nomination to each officer, there must be left as many blank spaces as there are vacancies to be filled, in which a voter may write or paste the name, without any title, of any person for whom he desires to vote, in which event he shall write in or paste in the residence of the person whose name is written in, before his vote shall be counted."

The only thing that is required is that the person's name and residence appear on the

sticker. It will be necessary that the names be spaced in such a manner that they appear directly to the left of the square in which the voter must insert a cross or a check mark in accordance with the instructions set forth at the top of the ballot in accordance with section 701, subsection 2 A.

If the sticker is printed properly, there is no reason why the one sticker carrying the name and the residence of each of the six candidates cannot be used.

GEORGE C. WEST
Deputy Attorney General

June 15, 1970
Aeronautics

Linwood F. Wright, Director

"Authorized representative of a political subdivision; Aeronautics; 'School Teacher' ".

SYLLABUS:

A public school teacher is not an "authorized representative" of the city where the teacher is employed, within the meaning of 6 M.R.S.A. § 12, so as to permit the Aeronautics Director to grant funds to that teacher in furtherance of the teacher establishment of an aeronautics course of study.

FACTS:

The provisions of 6 M.R.S.A. § 12 permit the Director of Aeronautics to "advance the interest of aeronautics" in the State by, among other things, "assisting and advising authorized representatives of political subdivisions within the State in the development of aeronautics * * * ". The provisions of 6 M.R.S.A. § 162 create an airport construction fund to be utilized, inter alia, to "Develop and promote aviation within this State". *6 M.R.S.A. § 162.*

A public secondary school science teacher in a city (not involving a school administrative district) seeks assistance from the Aeronautics Director to establish an aviation course at the school where he is employed; and if this is possible under 6 M.R.S.A. § 12, then the companion question involves the source of funds for such assistance. The teacher requests a grant of funds to subsidize his education as a condition precedent to establishing the aeronautics course in the school program.

QUESTIONS:

1. Would a public secondary school science teacher in a city be considered an authorized representative of a political subdivision within the meaning of 6 M.R.S.A. § 12?

2. If so, can the Director legally grant moneys to the teacher from the fund appropriated under 6 M.R.S.A. § 162?

ANSWERS:

1. No.

2. Since the answer to question No. 1 is negative, no response is necessary on question No. 2.

REASONS:

The reference teacher is employed by a city in the State; and the city is considered to be a political subdivision of the State. In *Burkett v. Youngs, et al.*, 135 Me. 459, 199 A. 619, the City of Bangor was declared a "territorial and political division of the State of Maine". *Id.*, p. 465.

It is necessary to next perceive whether a public secondary school teacher is an "authorized representative" of the city wherein he is employed, within the meaning of 6 M.R.S.A. § 12. Employment of teachers under Maine law is governed by 20 M.R.S.A. § 161, 5; the Superintendent of Schools nominates the teacher or teachers proposed to be employed. The local school board or directors (if a school administrative district) approve or disapprove the nomination or nominations and employment of the teacher or teachers so approved. This employment rests upon the superintendent. *Michaud v. Inhabitants of St. Francis,* 127 Me. 255, 143 A. 56. Clearly, under our laws, the public school teacher possesses rights accruing out of contract.

The occupation of a public school teacher is not that of a public officer though the employment be in a public capacity; instead the position is that of employee resting on contract. *Mootz v. Belvea,* 60 N.D. 741, 236 N.W. 358, 75 A.L.R. 1352. In *Whitney v. Rural Independent School Dist. No. 4,* (Iowa) 4 N.W. 2d 394, 140 A.L.R. 137, the court decided that a public school teacher was not a person holding "an official position, or standing in a representative capacity of the employer" within the meaning of a workman's compensation act. We invoke an analogy here; viewing public school teachers not to be a city's "authorized representative" possessing standing to do business with the Aeronautics Commission under 6 M.R.S.A. § 12. Admittedly, a teacher performs duties which are public or quasi public in character, this is not sufficient to create a municipal public office in the sense described in 30 M.R.S.A. § 1901, 7, 8:

"7. Municipal officers. 'Municipal officers' means mayor and aldermen of a city, and the selectmen of a town.

"8. Municipal official. 'Municipal official' means any elected or appointed member of a municipal government."

Any grant of funds by the Director to the reference teacher might well result in the doing of a vain thing because in the final analysis, the local school board "directs the general course of instruction"; thus, the establishment of the proposed aviation course of instruction. *20 M.R.S.A. § 473, 2.* While the members of a city's school board are thought to be municipal officials of the city, 30 M.R.S.A. § 1901, 8; 20 M.R.S.A. § 471, 472, 476, the employees of the board are not.

JOHN W. BENOIT, JR.
Deputy Attorney General

June 25, 1970
Education

Keith L. Crockett, Secretary-Treasurer
Maine School Building Authority

Town's Method of Voting upon Articles Prepared by Maine School Building Authority; Secret Ballot.

SYLLABUS:

In absence of a petition to the contrary, it is not necessary for a town to utilize the secret ballot procedure when voting upon articles prepared by the Maine School Building Authority pursuant to 20 M.R.S.A. § 3507, notwithstanding the town has accepted the secret ballot procedure relating to election of officers.

FACTS:

The Maine School Building Authority, after receiving an application from the Town of Windsor for construction of a school project in Windsor, has authorized the inhabitants of the Town to vote upon the acceptance or rejection of a proposed Lease Agreement with the Authority. *20 M.R.S.A. § 3507.* The Secretary-Treasurer of the Authority has suggested the form of the articles to be voted upon at a town meeting in Windsor, which articles have been forwarded to the officials of the Town in the usual manner. Voters haven't asked for printed articles.

The Town of Windsor has accepted the provisions of the Maine Statutes relating to elections of municipal officers by secret ballot. *R.S., 1954, c. 90-A, § 37; now 30 M.R.S.A. § 2061.*

Although elections of town officials occur by secret ballot in Windsor, the manner of voting on other business at Windsor town meetings is by a show of hands.

QUESTION:

Is it necessary for the inhabitants of the Town of Windsor to utilize the secret ballot procedure when voting upon articles prepared by the Maine School Building Authority pursuant to 20 M.R.S.A. § 3507, in absence of a petition requesting printed articles?

ANSWER:

No.

REASON:

Initially, a reading of 30 M.R.S.A. 2061 points up a specific directive that a municipality is required to have questions printed on ballots whenever the questions are "required by statute to be submitted to a vote."

> "5. Ballots, specimen ballots and instruction cards.
>
> Ballots, specimen ballots and instruction cards shall be prepared by the clerk according to the following provisions:
>
> " ***.
>
> "C. Any question required by statute to be submitted to a vote shall be printed below the list of candidates." *(Id., paragraph 5, C.)*

Thus, it is necessary to determine whether articles proposed by the Maine School Building Authority pursuant to 20 M.R.S.A. § 3507 are considered to be questions "required by statute to be submitted to a vote" in Windsor. The second paragraph of § 3507 calls for voter action relative to contracts, leases or agreements between a municipality and the Authority.

> "No contract, lease or agreement between an administrative unit and the Authority shall be valid unless first approved by the vote of a majority of the

residents of a town voting on this question, or of each town involved in the case of a community school district voting on this question, or by the residents of a School Administrative District in the manner provided in section 225. ***"

Query: Do the words "any question required by statute to be submitted to a vote" (§2061, 5, C) mean questions placed into the statutes by the lawmakers such as those existing in 20 M.R.S.A. § 22 (formation of school administrative districts), or does the reference language imply something different, i.e., the mere necessity of voting itself, as stated in 20 M.R.S.A. § 3507 above? The provisions of the statutes relating to the Maine School Building Authority, 20 M.R.S.A. § 3501 – 3517, do not recite the specific language of the questions to be utilized pursuant to § 3507.

For reasons given herein, the inhabitants of Windsor may vote upon the proposed articles (articles not involving election of officers) in the same fashion as Windsor conducts its business at regular or special town meetings.

In the case entitled *Frank E. Hancock, Attorney-General ex rel. George L. Atkins et als v. Robert S. Fuller, Selectman, et als,* Kennebec County Superior Court Docket (No Law Court appeal exists) the court issued written Findings and Conclusions dated March 9, 1960, relating to a Writ of Mandamus brought by voters of Farmingdale against the Selectmen of the Town requiring the printing of articles on the ballot concerning the question of the *formation of a proposed school administration district.* (The pertinent statutory provisions existing at that time relating to the formation of a proposed school administrative district were recited in *R.S., c. 41, § 111-F, IV. Now: 20 M.R.S.A. § 215.)* It was fact, in the case, that a sufficient number of the voters of the town had seasonably presented a petition to the selectmen requesting a secret ballot on the questions involving the formation of the district. No such petition exists in this case; and the case is thus distinguishable. In the Court's findings and conclusions calling for the printing of the school administrative district formation questions on the ballots, reliance was placed upon both the statute relating to the presentation of a petition to the selectmen requesting the printing of articles, and to the provision of 30 M.R.S.A. § 2061, 5, C: "Any question required by statute to be submitted to a vote shall be printed below the list of candidates." The cited case gave no answer to the question here: Whether the clause, "any question required by statute to be submitted to a vote" meant any question specifically propounded in the law by the Legislature, or meant something else, i.e., the need to vote per se. Continuing with the analogy of a vote on school administrative district formation questions, amendments made to the statutes relating to the formation of school administrative districts (made since the date of the noted decision) reasonably lead to a conclusion that, absent a petition for secret ballot procedures, the Legislature intends that the words: "any question required by statute to be submitted to a vote", mean the questions specifically enacted by the lawmakers for voter attention. If otherwise, the lawmakers would not have found it necessary to amend 20 M.R.S.A. § 215,4 to permit administrative units to vote upon specified articles relating to the formation of school administrative districts "in the same fashion as the units conduct other business at regular or special town meetings." Again, the laws relating to the Maine School Building Authority contain no specific questions propounded by the Legislature for presentation to the voters when considering contracts, leases and agreements between the Authority and municipalities.

Any interpretation of the subject clause to mean the mere act of voting itself would do violence to the provisions of the statutes relating to the procedures by which municipalities conduct business. For example, the several fiscal matters which may come before a municipality pursuant to 30 M.R.S.A. § 5101 – 5108 require a vote. In *Lovejoy v. Inhabitants of Foxcroft,* 91 Me. 367, 40 A. 141, the Court held that in order to render

a town liable to repay money borrowed and expended for the town by a town officer or agent, the municipality must have previously authorized or subsequently ratified the borrowing by vote at a legal town meeting upon a sufficient article in the warrant. Extending the meaning of the clause to the several matters recited in the municipal fiscal provisions of the statutes, thus calling for the printing of such fiscal questions on the ballot, would require that all town meeting action be conducted under the secret ballot provisions; not just the town's election of officers. Moreover, such an interpretation would render the provisions of 30 M.R.S.A. § 2061, 4 (petition procedure for placing an article on the ballot) a nullity because everything coming before the voters would appear on the ballot.

JOHN W. BENOIT, JR.
Deputy Attorney General

July 7, 1970
Mental Health and Corrections

G. Raymond Nichols, Director
Probation and Parole

Commutation Power of Governor and Council

SYLLABUS:

Although, under the commutation power vested in the Governor and Council they can not per se change a felony to a misdemeanor, they can commute a sentence for a felony to provide for eligibility for parole hearing equivalent to that applicable to a sentence following conviction for commission of a misdemeanor, such reduction of period of confinement being entirely within the commutation power.

FACTS:

One, Howard V. Alley, was convicted of possession of a narcotic drug under 22 M.R.S.A. 1964, § 2362. At the time of commission of the offense it was, under that section, a felony. Following conviction in the Superior Court and pending his appeal to the Supreme Judicial Court the 104th Legislature revised the above statute by P.L. 1969, Chapter 433, making such offense a misdemeanor.

The Supreme Judicial Court upheld Mr. Alley's conviction and he is currently serving a sentence at the Men's Correctional Center for a crime which, as above stated at the time of commission was a felony. Mr. Alley, by his attorney, has petitioned the Governor for commutation of his sentence in view of the legislative revision of the statute under which the crime of which Mr. Alley was convicted, is now a misdemeanor. Specifically, Mr. Alley has asked the Governor with the advice and consent of the Council to commute his sentence from a felony to a misdemeanor.

QUESTION:

Although, without authority to change the designation of the offense, has the Governor with the advice and consent of the Council authority to commute the sentence in question, so that the period of confinement prior to parole eligibility, may be equivalent to the period of confinement applicable to a sentence following conviction for the commission of a misdemeanor?

ANSWER:

Yes.

REASON:

The specific request of the petitioner, Howard V. Alley, that the Governor with the advice and consent of the Council alter the sentence which he is serving, from one for the conviction of the commission of a felony to one for conviction for the commission of a misdemeanor can not be granted per se, since the request calls for action to be taken by the Governor unrelated to the power of commutation of sentence, viz., the changing of one class of offense to another – felony to misdemeanor – a legislative function.

Pursuant to the commutation power possessed by the Governor, he, with the advice and consent of the Council can in substance grant the request of the petitioner, if in his judgment the request merits such determination. Under 34 M.R.S.A. § 1673 eligibility for parole hearing in the case of a felony arises prior to one year of confinement and in the case of a misdemeanor prior to six months of confinement. The Governor may commute Mr. Alley's sentence by providing that he shall be eligible for parole hearing upon completion of six months of confinement, resulting in treatment equivalent to that to which a misdemeanant is entitled. The total sentence does not appear to be in question here, since every sentence to the Men's Correctional Center, whether for a misdemeanor or a felony, is indeterminate to three years.

COURTLAND D. PERRY
Assistant Attorney General

July 9, 1970
Labor & Industry

Madge E. Ames, Dir. Minimum Wage

Applicability of Maine Labor Laws to Civilian Employer on a Military Base.

SYLLABUS:

The State of Maine does not have jurisdiction to enforce its labor laws on land that has been ceded to the exclusive jurisdiction of the United States Government.

FACTS:

A civilian employee operates a beauty parlor on Loring Air Force Base, Maine. The shop is located on the base in the Base Exchange, Building 5300. The records of the U.S. Air Force indicate that the site on which the building is located was purchased by the United States Government, and exclusive jurisdiction was accepted by the U.S. Air Force from the Governor of Maine on May 16, 1950.

The employee referred to is not paying the employees at the shop the minimum and overtime wages as required by Title 26 M.R.S.A. § 664.

QUESTION:

Must a civilian employer on a military base comply with Maine minimum wage laws?

ANSWER:

No.

REASONING:

The law in Maine as applied to these facts is best defined by *Berube v. White Plains Iron Works, Inc.* 211 F.Supp. 457 (1962). The facts in that case involved the issue of State jurisdiction over a tort occurring on Loring Air Force Base and whether the tort-feasor was doing business in the State. The Court said:

> "Loring Air Force Base was established some years prior to the accident at which time there was in effect a statute by which the State of Maine ceded to the United States exclusive jurisdiction over lands which it might take for constitutional purposes. Such a grant results in a transfer of sovereignty over the ceded land to the United States . . . Territorial jurisdiction in such a case is vested in the United States, and State regulation of activities upon such land is illegal."

The statutes of cession referred to above were Me. Rev. Stat. Ch. 2 § § 10, 11 (1930), Me. Rev. Stat. Ch. 1 § 11, 12 (1944) and Me. Rev. Stat. Ch. 1 § 9 (1954). These sections were subsequently repealed by P.L. 1959, Ch. 213 § 1 now 1 M.R.S.A. § § 8-10 (1964). The present state law, however, does not redefine the issue of jurisdiction; but only states the manner in which land in the future will be ceded to the U.S. Government. The exclusive jurisdiction of the United States in Loring Air Force Base vested under the prior acts and cannot be subsequently modified without concurrence of the United States. *In Re Ladd,* 74 Fed. 31 (Neb. 1896).

The interpretation by the District Court in Berube *agrees* with prior Maine case law on this subject. In *Brooks Hardware Co. v. Greer,* 111 Me. 78, 87 A. 889 (1913) the court said that "the effect of a cession of jurisdiction over certain territory within a state to the United States, by consent of the state, reserving to the state only concurrent jurisdiction to serve civil and criminal processes therein, is to put that territory under the exclusive jurisdiction and dominion of the United States, with the single exception expressed, at least when the property is purchased for the constitutionally specified purposes."

In our case *Berube,* supra, recognized that the acquisition of Loring Air Force Base was for a "constitutionally specified purpose." Those purposes are spelled out in Art. I, Section 8, Clause 17 of the United States Constitution. In view of the above interpretation, the State of Maine may not constitutionally exercise its jurisdiction with regard to its labor laws on Loring Air Force Base.

JOHN M. R. PATERSON
Assistant Attorney General

July 14, 1970
Aeronautics

Linwood F. Wright, Director

Possible revocation of Aircraft Dealers Registration.

SYLLABUS:

An individual cannot retain an aircraft dealer's registration certificate under the terms

of 6 M.R.S.A. §14 (4) unless the individual maintains a permanent place of business where the individual is principally engaged in the business of buying and selling aircraft.

FACTS:

A physician, a holder of an aircraft dealer's registration certificate, has an extensive medical practice. As such, he is principally employed in an occupation which is not the manufacturing, buying or selling of aircraft. He does not maintain a permanent place of business where the holder is principally engaged in the business of buying and selling aircraft. The physician operates an airplane under the dealer registration certificate for pleasure and in the course of his medical practice.

QUESTIONS:

1. Is the holder of the aircraft dealer's registration certificate a bona fide dealer within the meaning of the provisions of 6 M.R.S.A. § 14 (4) such that the holder can enjoy the benefits and privileges of such registration?
2. If the holder is not a bona fide dealer, may the Director revoke the aircraft dealer's registration certificate?
3. If the individual does not continue to hold a dealer's registration certificate, must the person register any aircraft he owns in the usual manner?

ANSWERS:

1. No.
2. Yes.
3. Yes.

REASONS:

Issuance and retention of a dealer's aircraft registration depends upon the Director being satisfied that the holder will engage principally in and continue to be engaged principally in "the business of manufacturing, buying and selling of aircraft". *6 M.R.S.A. §14 (4).* Annual renewal of the registration certificate is then expressly conditioned upon the maintaining of a "permanent place of business where said applicant is principally engaged in the business of buying and selling aircraft." *6 M.R.S.A. §14 (4).* If the holder is in fact engaged principally in an occupation other than the business of buying and selling aircraft, then the aircraft dealer's registration certificate is subject to being revoked by the Director.

The law provides that the Director may revoke a certificate "after notice and opportunity for hearing" for the reason of "violation of any provisions of chapters 1 to 13 or any rule or regulation duly issued hereunder". *6 M.R.S.A. §14 (3) and 6 M.R.S.A. §15.* Not maintaining a permanent place of business where the holder is principally engaged in the business of buying and selling aircraft or the engaging in an occupation or business which is not the manufacturing, buying or selling of aircraft can be said to be in violation of express provisions of *6 M.R.S.A. § 14 (4)* as well as the spirit of the dealers registration law.

Once the person no longer holds an aircraft dealer's registration certificate, he must then comply with the registration requirements of any aircraft which he owns. *6 M.R.S.A. §14 (1)* and *6 M.R.S.A. § 14(1) (A).*

GARTH K. CHANDLER
Assistant Attorney General

July 21, 1970
Environmental Improvement Comm.

William R. Adams, Director

Formation of Sewer Districts.

SYLLABUS:

A sanitary district formed under the provisions of 38 M.R.S.A. § 1101 (Public Laws, 1965, c. 310, as amended by P. L. 1967, c. 524) cannot include only parts of two municipalities but must include all of the two municipalities.

The municipalities comprising the district must convey title to the district of that part of their sewer property determined by the trustees of the district to be "necessary to carry on the functions of the sanitary district" including "all public sewers".

FACTS:

The cities of Rumford, Maine and Mexico, Maine propose to form a sanitary district under the provisions of Chapter 11, Title 38 M.R.S.A. The district proposed is to include only parts of each town, and it is further proposed that each town will retain ownership and control of its own sewer system and become a customer of the district which will have ownership and control of the interceptor system and the treatment plant.

QUESTIONS:

1. May sanitary districts be comprised of only parts of municipalities?
2. May towns comprising a sanitary district keep control and ownership of their own public sewer systems with the district having control and ownership of only the interceptor system and the treatment plant?

ANSWERS:

1. No.
2. No.

REASONING:

1. The language of 38 M.R.S.A. § 1062 and §1101 (P.L. 1965, c. 310 as amended by P.L. 1967, c. 524) clearly states the intent of the Legislature that only complete municipalities may form sanitary districts. 38 M.R.S.A. § 1062 states:

> "It is declared to be the policy of the State to encourage the development of sanitary districts consisting of a *municipality* or *2 or more municipalities* of sufficient size. . . . A sanitary district consisting of *a municipality, 2 or more municipalities,* . . ." (Italics supplied.)

38 M.R.S.A. § 1101 states:

> "The residents of and the territory within a single *municipality or within 2 or more municipalities* . . . may form a sanitary district . . . *The municipal officers of the municipality or municipalities* . . . shall file an application . . . setting forth the name or names of the *municipality* or *municipalities* . . . that propose to form said district. . . ." (Italics supplied.)

The law does not refer to "parts" or "portions" of municipalities but speaks in terms of whole entities.

2. The language of 38 M.R.S.A. §1103 and §1106 (P.L. 1965 c. 310, as amended by P.L. 1967, c. 524) sets forth the intent of the Legislature that the sanitary district formed shall have complete ownership and control of the sewer property or properties necessary to carry on the functions of the district. 38 M.R.S.A. §1103 states:

> ". . . the trustees of said sanitary district shall determine *what sewer property or properties* including treatment plants owned by any municipality within said sanitary district *shall be necessary to carry on the functions of the sanitary districts* and shall request in writing that the municipal officers of any municipality within said sanitary district convey the title to such sewer property . . ." (Italics supplied.)

38 M.R.S.A. §1106 states:

> ". . . the sanitary district shall become operative and *the trustees shall assume the management and control* of the operation *of all of the public sewers, storm and surface water drains,* treatment plants and related structures within the sanitary district and *the municipalities . . . shall have no responsibility for* the operation or control of *the public sewers and storm and surface water drains* and treatment plants within their respective jurisdictions. . . ." (Italics supplied.)

The law thus implies that "the public sewers and storm and surface water drains" are "necessary to carry on the functions of the sanitary district(s)" and thus must be transferred to the trustees of the district.

E. STEPHEN MURRAY
Assistant Attorney General

August 13, 1970

Dean Fisher, M.D., Commissioner, Department of Health and Welfare

Title 32, section 4182 M.R.S.A. (Certification of Social Workers without examination)

SYLLABUS:

The State Board of Social Worker Registration acted beyond its authority by establishing regulations relating to qualifications of social workers for the purpose of certification with the Board which were in direct conflict with Title 32, section 4182, M.R.S.A.

FACTS:

On or about January 15, 1970, the State Board of Social Worker Registration established and circulated regulations as to who could be certified by them as either Registered Social Workers or Associate Social Workers. Among others, the regulations provided that only those applicants with full Masters or Bachelors Degree credentials would be certified without examination, pursuant to Title 32, section 4182, M.R.S.A.

QUESTIONS:

1. Did the State Board of Social Worker Registration act within its rule making authority in establishing regulations requiring Masters or Bachelors Degrees of those persons applying for certification under Title 32, section 4182, M.R.S.A.?

2. What action, if any, should be taken by the Board to rectify its error?

ANSWERS:

1. No.
2. See reason.

REASON:

The State Board of Social Worker Registration derives its rule making authority under Section 4179 of Title 32. It provides the usual language giving the Board power to make such rules and regulations as are necessary to carry out its duties under the law.

The Board's duties as to the qualification of social workers is contained in Sections 4181 and 4182.

Section 4181 sets forth the general qualifications which must be met by a person in order to be certified by the Board. Among the required qualifications are a Masters Degree for a Registered Social Worker and a Bachelors Degree for an Associate Social Worker.

Section 4182 covers the certification of social workers without examination and is the part of the law the interpretation of which is of primary concern here. The first sentence of this section is the one vital to this opinion and states as follows: *"Any person who* within six months after the effective date of this chapter submits his application to the board on the prescribed form, pays the necessary fee and furnishes satisfactory evidence to the board that he is 21 years of age or over, of good moral character, a resident of this state, *is employed as a social worker or was so employed for two years out of the preceding five years, shall be registered by the board and certified as a registered or associate social worker without examination."* (Italics added.) As stated in State ex rel City of Indianapolis vs. Brennan, 109 N.E. 2d 409 (Indiana case) "The word 'shall' when used in a statute will be construed to be mandatory rather than directory, unless it clearly appears from context or from manifest purpose of act as a whole that legislature intended that a different construction should be given to the word 'shall'." No such contrary intention is evident in this statute.

Section 4182 is then an exception, or grandfather clause if you prefer, to the qualifications required in section 4181 and the Board by regulations cannot require a qualification which the legislature plainly intended should not apply to those persons who came within the distinct and separate qualifications of section 4182.

> See 1 Am Jur 2d, s 132 and Bingham's Trust vs. Comm 325 V.S. 365 In which it is said, "Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with the act being administered."
>
> See also Joyce vs. Webber 157 Me 234, "Insofar as rules promulgated by subordinate authority tend to contravene provisions of controlling law, rules are of no effect."

Perhaps the most troublesome problem here presented is as to what the Board must do to rectify its error. Of course, if an applicant has met the legal requirements of section 4182 as to qualification for certification by the Board, it is duty bound to certify that person. However, only those who have met all the requirements of the first sentence of section 4182 would be considered as having met the legal requirements. One of these requirements is that application be made by the prospective social worker within six

months after the effective date of the act, which was October 1, 1969. This allowed applications to be made up to April 1, 1970. The Board, however, in about mid-January of 1970 promulgated the offending regulations and saw to it that some ninety social worker organizations and associations were furnished with copies thereof. This action by the Board has undoubtedly prevented an unknown number of persons from seeking certification.

It is suggested, therefore, that the Board review all applications made but rejected because the applicants lacked the required degree. If all other qualifications were met, these persons should be certified without delay. As to those unknown persons who might have applied, but did not, they cannot legally be considered under the statute as it now stands.

The Board might well consider going to the 105th Legislature with a request for relief, perhaps in the form of a new grandfather clause which would encompass those persons reasonably intended to be encompassed, keeping in mind the obvious problem of determining who these people might be. This clause should also encompass those applicants who will now be certified as a result of this opinion, thereby removing any lingering doubt as to the legality of their certification.

One more problem faces the Board and that is contained in the last words of the first sentence of section 4182. They provide for certification "as a registered or associate social worker without examination," but give no guideline as to how the Board should determine which type social worker a given applicant should be. It would then appear that the Board has broad discretion to set up its regulations relating to this subject so long as it certifies qualifying applicants as one or the other. It could, it would seem, require that applicants under this section must have a Masters or Bachelors Degree to become a registered social worker leaving all those without such qualifications to be associate social workers. This is a suggestion merely, but should provide a guide to the Board in setting up its regulations.

KEITH N. EDGERLY
Assistant Attorney General

August 17, 1970
State

Joseph T. Edgar, Secretary of State

Required Filing of Affidavit by Foreign Corporations

SYLLABUS:

A foreign corporation having power to loan money in its state of incorporation may not utilize that power in Maine upon registration with the office of the Secretary of State. Such a corporation is a bank under Maine law and must forego the power to loan money in Maine.

FACTS:

A foreign corporation has registered with the Secretary of State to do business in Maine. At the time of registration it was empowered under the laws of the state of incorporation to loan money for profit. At the request of the Secretary of State affidavits stating it would not loan money nor engage in any activity prohibited by

Maine law were filed. The corporation now wishes to engage in the business of loaning money in Maine and seeks to withdraw the affidavits or file appropriate papers to nullify the filed affidavits.

QUESTION:

Can the Secretary of State permit the withdrawal or nullification of the filed affidavit so that the foreign corporation may engage in the business of loaning money in the State of Maine?

ANSWER:

No.

REASON:

A foreign corporation, other than certain named businesses, doing business in Maine must register with the Secretary of State. 13 M.R.S.A. §591. Among the businesses not required to so register are a bank, savings bank and trust company.

The charter or certificate of organization of the reference foreign corporation simply states that the persons have "associated ourselves together for the purpose of forming an investment company under and pursuant to the Banking Law of the State of New York." The Banking Law of the State of New York authorizes a corporation formed thereunder to loan money for profit.

The loaning of money for profit by a corporation, except as a reasonable incident to the transaction of other corporate business, or when necessary to prevent corporate funds from being unproductive, is banking business. 9 M.R.S.A. § 222 subsection 1, Paragraph B. A corporation which engages in the banking business must be considered a bank. Black's Law Dictionary, Fourth Edition, page 184.

The subject corporation is a bank under the law of the state of its incorporation. Hence, if it performs one of its functions of loaning money in Maine, it is a bank. As such it may not appoint an attorney for service of process under 13 M.R.S.A. §591. It may not file with the Secretary of State a copy of its charter or certificate of organization. See §592.

Some controversy exists as to the meaning and extent of the section 593, which states:

> "The Secretary of State shall refuse to accept or file the charter, certificate or other papers of, or accept appointment as attorney for service for, any such corporation which does a business in this State, the transaction of which by domestic corporations is not then permitted by the laws of this State.
>
> "When a foreign corporation otherwise qualifies under the laws of this State, but its charter contains purposes in conflict with the purposes permitted domestic corporations under the laws of this State, the Secretary of State shall accept or file certificates or other papers of such foreign corporation pursuant to section 592, if such foreign corporation files therewith a copy of a vote of either its stockholders or board of directors duly certified by the officer having charge of the original record, that such purposes in conflict with the laws of this State shall not be exercised by the foreign corporation in the course of doing business within this State, and that such foreign corporation so admitted or qualified shall not thereafter transact in this State any business which a corporation organized under

the laws of this State is not permitted to transact."

The subject corporation claims that the loaning of money is a business permitted domestic corporations by the laws of the State. With such a statement we cannot disagree. See 9 M.R.S.A. § 991 et seq. (trust companies); § 3201 et seq. (loan companies).

However, we must construe § 593 in connection with and in harmonious accord with § §591 and 592. Section 593 cannot stand alone. It would not make sense to interpret the language literally and contrary to the two preceding sections. These three sections set up an arranged plan whereby corporations organized in other States may do business in Maine and by appointment of an attorney for service of process be subjected to the jurisdiction of the Maine courts. Certain corporations, as listed in § 591, are not granted this privilege. Among these are banks.

We must, therefore, interpret § 593 as referring only to those types of corporations that are specifically exempted by § 591 from filing with the Secretary of State.

GEORGE C. WEST
Deputy Attorney General

August 18, 1970
Education

Kermit S. Nickerson, Commissioner

SYLLABUS:

Requirement of federal law that Department of Education supervise the administration of State plan for education of handicapped children creates limitation restricting transfer of federally purchased equipment and materials from State College to University of Maine under P. & S. L. 1967, Chapter 229, § 4-C.

FACTS:

Under Title VI-A, Elementary and Secondary Education Act (20 USCA §§871 – 877) the Department of Education is the State agency for administration of that Title concerned with special education for handicapped children. The federal law requires that the Department of Education file with the federal agency a State Plan under which it will operate. The Department of Education did this and the plan has been approved by the federal agency.

Equipment, material and supplies may be purchased with the federal funds granted to the State. Title to such property must remain in a public agency.

> "The (State) plan must provide satisfactory assurance that the control of funds provided under this part, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property." 20 USCA § 874 (c).

The former Farmington State College, now the University of Maine at Farmington, was designated by the State Department of Education as a Special Education Instructional Materials Center. At that time, the State Board of Education supervised Farmington State College. Equipment, materials and supplies were purchased by the State Department of Education with Federal funds. The Special Education Instructional Materials Center could well be said to be a type of warehouse and distribution center or a library for the storage and loaning out of materials to be used in the education of

handicapped children.

Private and Special Laws 1967, Chapter 229, created the new University of Maine, by which this state college became a part thereof. On May 26, 1968, ". . . all of the assets, tangible or intangible, real, personal and mixed, of, or used in connection with . . . Farmington State College . . . except such as are in trust or are subject to limitations purporting to restrict their transferability or assignability, are transferred and assigned to the university." Section 4-C.

QUESTION:

Did ownership of the equipment, materials and supplies purchased for the Special Education Instructional Materials Center at Farmington State College with federal funds and used in the education of handicapped children pass to the University of Maine by virtue of P. & S. L. 1967, Chapter 229, § 4-C?

ANSWER:

No.

REASON:

There is another provision of 20 USCA which must be considered. Section 874 (f) states:

> "The (State) plan must provide that the State educational agency will be the sole agency for administering or *supervising* the administration of the plan." (Emphasis supplied.)

At the time the equipment, material and supplies were purchased, Farmington State College was under the supervision of the Department of Education. The federal law provides, in substance, that the Department of Education must supervise the plan, which includes the Special Education Instructional Materials Center. It no longer can supervise the Special Education Instructional Materials Center, since Farmington State College became a part of the University of Maine. The requirement of supervision must be considered as a "limitation (s) purporting to restrict their transferability or assignability" so that they were not transferred to the university by P. & S. L. 1967, Chapter 229, § 4-C.

GEORGE C. WEST
Deputy Attorney General

August 24, 1970
Planning & Dev. Div. – BPI

Richard G. Bachelder, Sup'v'g Eng.

Building at SMVTI

SYLLABUS:

The underlying intent of a bond issue will govern the interpretation of the language.

FACTS:

P. & S. L. 1969 Chapter 240, was a bond issue which authorized $3,825,000 to construct buildings at the four state technical institutes plus a building for the Boys Training Center. We are here concerned with the item listed as:

"Southern Maine Vocational-Technical Institute

Culinary arts and electronics electrical building 1,010,000"

The Bureau of Public Improvements and the Department of Education both have indicated that it will be impractical to construct one building housing a culinary arts department and an electronics electrical department. Both agree that two separate buildings at separate locations on the campus would be the more desirable. It is pointed out that the two departments are not necessarily compatible. There is no logical connection between the two functions.

QUESTION:

May separate buildings be constructed to house the culinary arts and electronics electrical departments?

ANSWER:

Yes.

REASON:

The legislature has indicated and the people have approved a sum of money to institute two additional courses or programs at SMVTI. In doing this the language used was a "building" rather than "buildings." To what extent should reason and practicality be smothered by technicality? It can be pointed out that in the construction of statutes,

"Words of the singular number may include the plural; . . . ." 1 M.R.S.A. § 71, subsection 9,

unless inconsistent with the plain meaning of the enactment. We find nothing inconsistent with an interpretation allowing separate buildings to be constructed. A rule of statutory construction is to consider legislative intent and object it had in view. *Hanbro Inc. v. Johnson,* 158 Me. 180. In construing a statute, we must look to purpose for which law is enacted and must avoid a construction which leads to a result not within contemplation of lawmaking body. *Greaves v. Houlton Water Co.* 143 Me. 207. A construction should be avoided which leads to a result which is absurd even though strict letter of law may have to be disregarded. *Emple Knitting Mills v. City of Bangor,* 155 Me. 270.

We believe the underlying intent is to give to SMVTI adequate space to teach culinary arts and electronics electrical, not just to construct a building. The construction of a facility or facilities is incidental to the reason for the bond issue. (An analogy to the foregoing is the error in computation of the sub-total. This can be ignored because it does not change the final total.)

GEORGE C. WEST
Deputy Attorney General

September 11, 1970
Real Estate Commission

Leo Carignan, Executive Secretary

Withdrawal Agreement – Multiple Listing Service

SYLLABUS:

A multiple listing service that offers to agree or does agree with an owner of real estate to list the owner's property for sale is acting as a real estate broker.

FACTS:

The A.B.C. Multiple Listing Service Inc., uses a withdrawal agreement that contains the following language:

"Subject Property:
Listing No.:
Owner:

The A.B.C. MULTIPLE LISTING SERVICE, INC. of Portland, Maine and hereby agree to withdraw Real Estate listing No. from their files and Service, remove any "for sale" signs and to consider the property off the market and not for sale as of

"In consideration of the above withdrawal and of the special sales effort on the part of the A.B.C. Multiple Listing Service, Inc. and by the owners of Listing No. do hereby agree to the following conditions:

"If the owners should reconsider and if the above named property should come back on the market and be for sale at any time during the next 6 months, the owners do agree to relist their property with the above named broker and A.B.C. Multiple Listing Service, Inc. at an agreed price, for a period of not less than 4 months and at a commission rate of % of the selling price.

"The time of this agreement shall expire 19––.

Owner

Agent:

Approved by
(A.B.C.M.L.S.) Director"

ISSUE:

Is the A.B.C. Multiple Listing Service, Inc. acting as a real estate broker in offering to enter into or entering into the subject agreement?

ANSWER:

Yes.

REASON:

The Maine Real Estate Law defines a real estate broker as:

". . . any person, firm, partnership, association or corporation who for a compensation or valuable consideration sells or offers for sale, buys or offers to

buy, or negotiates the purchase or sale or exchange of real estate, . . . or *offers to list for sale . . . any real estate . . . for others as a whole or partial vocation."* (Emphasis added.) *32 M.R.S.A. § 4001 (2).*

The subject withdrawal agreement provides, in pertinent part that:

"If the owners should reconsider and if the above named property should come back on the market and be for sale at any time during the next 6 months, the owners do agree to relist their property with the above named broker and A.B.C.M.L.S., Inc. at an agreed price, for a period of not less than 4 months and at a commission rate of % of the selling price."

The above language would appear to obligate the owner to relist his real property, as for sale, with both the broker and A.B.C.M.L.S. at a stated commission rate.

Since A.B.C.M.L.S. is party to an agreement wherein an owner of real estate purports to agree to list his property as for sale with A.B.C.M.L.S. for a commission, the listing service would be engaging in an activity which falls within the definition of a real estate broker, to wit:

". . . [one] who for a compensation . . . offers to list for sale . . . any real estate . . . for others as a whole or partial vocation." 32 M.R.S.A. § 4001 (2).

It should be noted that I offer no opinion as to the legal rights of the parties to the subject agreement but instead consider the language of the agreement for what it purports, on its face, to accomplish.

In conclusion, if the A.B.C.M.L.S. offers to or does enter into an agreement containing the language as noted earlier it would be acting as a real estate broker under 32 M.R.S.A. §4001 (2) and as such would be required to comply with the licensing provisions of this State.

CLAYTON N. HOWARD
Assistant Attorney General

September 17, 1970
Labor and Industry

Joseph W. Emerson, Chief Inspector of Boilers

Boiler Regulation in a Commercial, Nuclear, Electric Power Plant in Maine

SYLLABUS:

Steam generators in a commercial electric plant, including a nuclear operated plant, located within this State, are under the control of the federal government (42 USC§§ 2021 (c), 2014 (cc) and 2133 and 2018) or the Maine Public Utilities Commission, 35 M.R.S.A. §15, and 42 USC §2021 (k).

FACTS:

A commercial, nuclear, electric power plant contains "steam generators," which, by definition, are "boilers." 26 M.R.S.A. §173 empowers the Maine Board of Boiler Rules and Regulations to "formulate rules for the safe and proper construction, installation, repair, use and operation of steam boilers in this State." On March 24, 1964, the Board adopted Section III (Nuclear Vessels) of the American Society of Mechanical Engineers Code, "insofar as this Section may apply to steam boilers or 'steam generators' in nuclear steam generating installations in this State." 26 M.R.S.A.§142 provides that "This

subchapter [includes §173] shall not apply to boilers which are under federal control; or those under the control of the Public Utilities Commission; * * * *."

QUESTION:

Is the Maine Board of Boiler Rules and Regulations authorized to regulate steam generators in a commercial, nuclear, electric power plant located in Maine?

ANSWER:

No.

REASONS:

An electrical plant operated within this State for the public sale of electricity (35 M.R.S.A. §15, 5 and 15, 6) "is declared to be a public utility and to be subject to the jurisdiction, control and regulation of the [Public Utilities] Commission * * * * " (35 M.R.S.A. §15, 13) and is required by 35 M.R.S.A. §51 to furnish safe facilities. The definition of an electrical plant provided in the foregoing references clearly encompasses the steam generators (boilers) in a commercial, nuclear, electric power plant located within this State. Hence, unless preempted by federal law, such boilers are under the control of the Maine Public Utilities Commission, and 26 M.R.S.A. § 142 expressly precludes the Maine Board of Boiler Rules and Regulations from exercising any regulatory power over such boilers.

The Atomic Energy Act provides for federal control of the use of atomic energy. It gives to the AEC Commission the responsibility for regulation of the construction and operation of any utilization facility. 42 USC §2021 (c). Such a facility includes a commercial, nuclear, electric power plant located within this State. See 42 USC §§2014 (cc) and 2133. However, 42 USC §2021 (k) provides that:

> "Nothing within this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

Furthermore, 42 USC § 2018 states:

> "Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission; PROVIDED, That this section shall not be deemed to confer upon any Federal, State, or local agency any authority to regulate, control, or restrict any activities of the Commission."

Hence, it is clear that the federal Atomic Energy Act has preempted regulation of the nuclear reactor within a commercial, nuclear, electric power plant located in this State, leaving to the State the regulation of all other activities of such a plant, provided such State regulation does not affect the preempted area of federal regulation of radiation hazards. Determination of whether or not State regulation of a steam generator in a nuclear power plant could be accomplished without interference with federal regulation of radiation hazards would require technical evaluation of a particular steam generator in a specified nuclear power plant. However, such a determination is unnecessary at this time, since it is immaterial to the question posed in the current inquiry. It is certain that any such boiler is either under federal control or under the control of the Public Utilities Commission, and that, in either event, any such boiler is exempted from regulation by

the Maine Board of Boiler Rules and Regulations. 26 M.R.S.A. §142.

CHARLES R. LAROUCHE
Assistant Attorney General

October 1, 1970
Legislature

Raymond Rideout, Ch. Gov. Operations

University of Maine Motor Vehicles

SYLLABUS:

1. The University of Maine is a body corporate and its motor vehicles are not state-owned vehicles.
2. The University of Maine, being an instrumentality and agency of the State for restricted purposes, the Secretary of State is authorized to issue registration certificates and plates without fee to State governmental agencies.
3. Since the University of Maine is an instrumentality and agency of the State for restricted purposes, there is no legal impediment to the inclusion of its motor vehicles under the State's insurance contract.

QUESTIONS:

1. Are the University of Maine vehicles considered State vehicles and are they covered under Chapter 544 of the Public Law as enacted by the Special Session of the Maine Legislature?
2. If the University vehicles are not State owned, do they have to pay excise taxes and/or license fees for their registration?
3. If the University vehicles are not State vehicles, can they be legally covered under the State Motor Vehicle Insurance contract?

ANSWERS:

1. No.
2. See Reason 2.
3. See Reason 3.

REASONS:

1. The University of Maine was established by P. & S. Law 1865, Chapter 532, as a body politic and corporate by the name of The Trustees of the State College of Agriculture and Mechanic Arts with power to establish and maintain a college. In *Orono v. Sigma Alpha Epsilon Society,* 105 Me. 214, it was held to be a legal entity wholly separate and apart from the State. It holds its property, both real and personal, in the name of the University. Although by 20 M.R.S.A. § 2252, as enacted by P.L. 1945, Chapter 98, it was declared to be an instrumentality and agency of the State for restricted purposes, it was said in Opinion of Attorney General, April 30, 1945, that the reason for this declaration was in connection with the University's entitlement to receive Federal funds, and the University has continued to hold its property in its own name, and to exercise the powers of a corporation. As recently as 1967, the Act to Coordinate

Public Higher Education (P. & S. 1967, Chapter 229) provided that "all the assets, tangible or intangible, real, personal and mixed [of the State colleges] are transferred and assigned to the university", and the Attorney General was empowered to effect such transfers.

2. As has been noted above, the Legislature declared the University to be an instrumentality and agency of the State for restricted purposes. As such, even though it is a separate entity, it is a "State governmental" agency, to whom the Secretary of State is authorized by 29 M.R.S.A. § 256, to issue registration certificates and plates without fee. It is noted that, in 1943, prior to the afore-mentioned declaration, it was determined in Opinion of Attorney General, March 17, 1943, that, since the University was not then such an instrumentality, the Secretary of State was not justified in issuing motor vehicle registrations without fee.

As to the liability of the University for payment of excise tax, we refer to 36 M.R.S.A. §1483, subsection 8. Undoubtedly the University enjoys excise tax exemption as a literary and scientific institution not taxable as to its real estate.

3. Since the University is an instrumentality and agency of the State for restricted purposes, there is no legal reason why its vehicles may not be included under the State's insurance contract. We have not given an unqualified "Yes" answer to your question however, since it is a matter for the insurance companies to decide whether to include in the insurance contract vehicles other than State owned. Very likely some companies would decline to accept such an inclusion. The University does maintain its own comprehensive fire and theft coverage, and insures occupants of its vehicles for medical payments coverage. But its vehicles are included in the State's public liability policy by special endorsement with stated limits of coverage.

LEON V. WALKER, JR.
Assistant Attorney General

October 16, 1970
Environmental Improvement Comm.

Henry Mann, Chemist

Augmented Water Flow for Dilution Purposes.

SYLLABUS:

The Environmental Improvement Commission in issuing a waste discharge license is only determining that the proposed discharge will not lower the classification of any receiving body of water. The Commission's decision is not an adjudication of the rights of various riparian owners.

FACTS:

An application for a waste discharge license had previously been turned down, since it was determined by the Environmental Improvement Commission that the flow of the receiving waters would not be constant enough to accommodate such a load of waste. Now, that applicant proposes to dilute his waste by artificially augmenting the stream flow. This augmentation will be achieved by adding uncontaminated water from the local water district to the prior proposed waste flow.

QUESTIONS:

1. If the Environmental Improvement Commission grants a license to the applicant, will it be interfering with the rights of downstream riparian owners?
2. Should the Environmental Improvement Commission append a "riparian rights disclaimer statement" to any license issued in this case?

ANSWERS:

1. No.
2. No.

REASONING:

The questions posed may be disposed of without a direct answer by applying the rationale of the Maine Supreme Judicial Court as stated in *Stanton v. Board of Trustees of St. Joseph's College,* 233 A.2d 718 (1967) and 254 A.2d 597 (1969). The facts in the Stanton cases appear to be similar to the facts presented. In those cases, the Environmental Improvement Commission determined that a proposed discharge would meet the statutory criteria assigned to the receiving waters, and issued a license. Downstream riparian owners on a non-navigable stream successfully enjoined this licensed discharge as an interference with their riparian rights.

In rendering its decision, the Law Court specifically discussed the powers of the then Water Improvement Commission. The Court stated that it was the statutory authority of the Commission to determine only whether any proposed discharge would lower the classification of the receiving body of water and hence was in the *public* interest. If such criteria will be met, a license *must* issue. However, the Court went on to state that the Commission:

> ". . . was empowered only to determine whether the discharge of the defendant's sewage effluent into the brook would be against the public interest." *Stanton,* 233 A.2d 718, 724-725 (1967).

Thus, the Environmental Improvement Commission does not have the authority to declare the *private* rights of a riparian owner vis-a-vis upstream owners. Nor does the granting or denial of a license in any way act as an adjudication of the respective rights of such riparian owners. In the instant case, should the Commission deny a license because of this "riparian rights doctrine", the Commission would be going beyond its statutory mandate to insure that the effluent meets certain water quality criteria. Such a decision would be then open to challenge by the rejected applicant.

Since we have disposed of the questions in the above fashion, we need not now go into the question of whether in fact the proposed discharge will be detrimental to downstream riparian owners. Furthermore, since this issue cannot be considered by the Commission, there need be no "disclaimer" in any license issued. Such a "disclaimer" would be meaningless.

JOHN M. R. PATERSON
Assistant Attorney General

October 16, 1970

Industrial Building Authority

Roderic C. O'Connor, Manager

Maine Industrial Building Authority Aid to Existing Firms

SYLLABUS:

The Maine Industrial Building Authority can aid an already existing Maine industrial, manufacturing, fishing or agricultural enterprise, pursuant to 10 M.R.S.A. § 702 as amended, upon its determination that such aid will further expand that enterprise in the State of Maine.

FACTS:

The reported facts bearing on question 1, below, appear to be that a textile plant is about to be liquidated, a member of the present management proposes to form a new corporation and to lease the plant from a newly formed local development corporation after it has acquired the mill from proceeds of a MIBA insured loan. There would be no assurance of either expansion of the plant operation or of increased employment at the plant.

The reported facts bearing on question 2, below, appear to be that the owner of a paper mill and the owner of a textile mill have found that capital funds are tied up in plant facilities, i.e., real estate, machinery and equipment. As a result, each feels that he has insufficient working capital with which to continue operations. In each case, the firm proposes to ask the community to form a local development corporation which would acquire the property with the proceeds of a MIBA insured loan. This money would then be available to the operating firm which would lease the property and would be able to continue operation of the plant, or to resume operation if it were closed, by using the purchase money as working capital.

QUESTIONS:

1. Can the Authority insure a loan to a Local Development Corporation, not involved in a previously insured mortgage loan, for acquisition of an industrial plant, presently in operation, provided it is determined by the Authority that such operation will cease, if the plant is not made available to a new tenant by means of a lease arrangement made possible by such insured borrowing?

2. Can the Authority insure a loan to a Local Development Corporation, the proceeds of which will be used to acquire an existing industrial plant for lease back to the present owner, and in this manner provide working capital for that present owner to enable continued operation of the plant?

ANSWERS:

Yes, to both questions, but see REASONS.

REASONS:

The legislative purpose for the function of the Maine Industrial Building Authority is "to provide enlarged opportunities for gainful employment by the people of Maine. . . ." *10 M.R.S.A. § 702.* (P.L. 1957, c. 41, § 1, as amended by P.L. 1965 c. 142, § 1 and P.L. 1967, c. 525, § 1.) Toward that end, the Legislature seeks, through the Maine Industrial Building Authority, ". . . to stimulate a larger flow of private investment funds . . . to help finance expansion of industrial, manufacturing, fishing and agricultural

enterprises." (Ibid.) The Legislature expressly authorized the Maine Industrial Building Authority to ". . . encourage the making of mortgage loans for the purpose of furthering expansion of such enterprises in the State." (Ibid.)

It is clear from the legislative language that the Maine Industrial Building Authority is authorized to aid already existing as well as new Maine firms, provided: (1) that the firm is either an industrial, manufacturing, fishing or agricultural enterprise; and (2) that aid by the Maine Industrial Building Authority is for the purpose of providing enlarged opportunities for gainful employment by the people of Maine.

The first criterion is fulfilled in each of the above-stated fact situations in that each activity is a manufacturing enterprise.

The second criterion requires a judgment that enlarged employment opportunities will result by such aid. This judgment must be reached by an assessment of all the available facts in each case. The Legislature has vested the power of making such a judgment solely in the sound discretion of the MIBA.

CHARLES R. LAROUCHE
Assistant Attorney General

November 23, 1970
Maine State Ferry Service

Richard Spear, Manager

Ferry Service to *All* Islands in Casco Bay

SYLLABUS:

The Maine Port Authority may conduct ferry service between the mainland and any island in Casco Bay located within the city limits of Portland and the Town of Cumberland, provided that the Public Utilities Commission has determined that private service to those islands is not feasible.

FACTS:

The Maine Port Authority has been authorized by Special Acts of this State to conduct ferry service from the mainland to certain islands in Casco Bay. The Port Authority wishes to conduct its own ferry service to islands other than those specifically mentioned in the Special Acts of this State.

QUESTION:

Whether the Maine Port Authority may conduct ferry service to islands other than those specifically mentioned in the laws of this State.

ANSWER:

Yes, provided certain conditions are first met.

REASON:

The Maine Port Authority was originally created as the "Port of Portland Authority"

by Special Act of the Eighty-Fourth Legislature in 1929. In that Act it was provided that:

"Sec. 1. 'Port of Portland Authority,' created. There is hereby created 'Port of Portland Authority', hereinafter referred to as the 'Port Authority', which shall be a body corporate and politic, having the same rights, privileges and powers as have corporations organized under the general law in addition to, and except insofar as inconsistent with, the powers herein enumerated, with the right to adopt a common seal and to establish by-laws and regulations for the management of its affairs not repugnant to its charter and the laws of this state . . . .". 1929 Priv. & Spec. ch. 114.

The purposes and powers of the Port Authority were as follows:

"(b) Purposes; powers. The . . . . Authority is constituted a public agency of the State of Maine for the general purpose of acquiring, constructing and operating piers and terminal facilities at the Port of Portland. . . . .; it may acquire, hold and operate lighters and other vessels necessary or convenient; it may establish and collect the fees, rates, rentals and other compensation for the use of its property and facilities, ..." 1929 Priv. & Spec. ch. 114.

In 1945 the name was changed from the "Port of Portland Authority" to the "Maine Port Authority."

In 1957 the legislature enacted a special law which imposed on the Maine Port Authority:

". . . . the duty . . . . to operate a ferry line or lines between the mainland and the towns of North Haven, Vinalhaven, Islesboro and Swan's Island for the purpose of transporting vehicles, freight and passengers to and from said towns." 1957 Priv. & Spec. ch. 190 Sec. 1.

In this same Act, chapter 114 of the 1929 Act was amended by adding a new subsection (e) of section 1 which read as follows:

"(e) Ferry service for North Haven, Vinalhaven, Islesboro and Swan's Island. It shall be the duty of the Maine Port Authority to operate a ferry line or lines between the mainland and the towns of North Haven, Vinalhaven, Islesboro and Swan's Island for the purpose of transporting vehicles, freight and passengers to and from said towns." 1957 Priv. & Spec. ch. 190, Sec. 11.

The above quoted subsection was further amended in 1959, by adding the following language:

". . . . and the Maine Port Authority may operate such ferry line or lines to and from Long Island Plantation." 1959 Priv. & Spec. ch. 125 Sec. 1.

In 1959 the original purposes of the 1929 charter were expanded to include the following:

". . . . and for the purpose of securing and maintaining adequate ferry transportation for persons and property between the mainland and the islands in Casco Bay located within the limits of the City of Portland and the Town of Cumberland . . . ." 1959 Priv. & Spec. ch. 79 Sec. 2.

In addition, the 1959 Act provided that:

"(f) . . . . Whenever it is determined by the Public Utilities Commission that ferry transportation for persons and property between the mainland and the islands in Casco Bay located within the limits of the City of Portland and the Town of Cumberland can no longer feasibly be provided by private operators . . . . the Port Authority shall take such means as shall be necessary to secure such service . . . ." 1959 Priv. & Spec. ch. 79, sec. 3.

It is important to note that the Authority has the specific duty to provide ferry

service between certain islands and the mainland while it is imposed with the more general duty of " . . . securing and maintaining adequate ferry transportation for persons . . . . between the mainland and the Islands in Casco Bay . . . .". 1959 Priv. & Spec. ch. 79 Sec. 2.

This latter duty of the Authority may include providing and conducting the service, itself, if the Public Utilities Commission determines that the ferry service cannot be provided by private operators.

In conclusion, if the Maine Port Authority wishes to provide ferry service to islands in Casco Bay, other than North Haven, Vinalhaven, Islesboro, Swan's Island, and Long Island Plantation, it may do so provided that they are located within the limits of the City of Portland and the Town of Cumberland and provided further that the Public Utilities Commission has determined that ferry service by private operators, if any, is not longer feasible.

CLAYTON N. HOWARD
Assistant Attorney General

November 24, 1970
Banks and Banking

Elmer W. Campbell, Commissioner

Permitted charges under 9 M.R.S.A. Section 229

SYLLABUS:

Charges for credit insurance made in connection with a loan governed by 9 M.R.S.A. § 229 are not to be added to the other loan charges in determining whether the loan charges are in excess of the maximum interest permitted for loans in excess of $2000 if such insurance charges are within the scope of 24-A M.R.S.A. Section 2861.

FACTS:

A loan company is engaged in loaning funds which are subject to 9 M.R.S.A. § 229. Section 229 prohibits the company from charging more than 16% per year, simple interest on its loans. In conjunction with its loans the loan company is also charging for credit insurance which is issued through it to its debtors. The loan company is not including the credit insurance charges in its calculation of annual interest charges for the purpose of determining compliance with 9 M.R.S.A. § 229.

QUESTION:

Do charges for credit insurance issued through a creditor for a debtor constitute a charge which is to be included in calculating the interest rate for purposes of determining whether the rate charged exceeds the maximum chargeable under 9 M.R.S.A. § 229?

ANSWER:

No, with the exceptions indicated below.

REASONS:

The pertinent statute provides as follows:

"No person, co-partnership or corporation shall, directly or indirectly, charge, contract for or receive any interest or consideration greater than 16% per year simple interest upon the nonbusiness or personal loan, use or forebearance of money, goods or choses in action, or upon the nonbusiness or personal loan use or sale of credit, of the amount or value in excess of $2,000. . . ." *9 M.R.S.A. § 229.*

The question to be resolved is whether the above quoted prohibitory language would prohibit a creditor from charging a debtor for credit insurance when such additional charge would, when added to the other loan charges, exceed the 16% maximum. Standing alone the above language would appear to prohibit such additional charges. The Maine Legislature has, however, expressly addressed itself to the credit insurance issue, in this State's recently enacted Insurance Code. The loan laws and the insurance laws must be read together to determine the comprehensive scheme that was intended.

The Insurance Code expressly exempts certain premiums from the charges referred to in § 229 above. The Code provides that:

"1. The premium or cost of such insurance when issued through any creditor shall not be deemed interest, or charges, or considerations, or an amount in excess of permitted charges in connection with the loan or other credit transaction . . . . shall not be deemed a violation of any other law, general or special, of the State of Maine.

"2. The amount charged to a debtor for any credit life or credit health insurance shall not exceed the premiums charged by the insurer . . .". 24-A M.R.S.A. § 2861.

However, it should be noted that consequently, if the Insurance Code expressly or impliedly exempts certain premium charges from its coverage so that the above provision does not apply, then they would have to be included as charges under § 229 of the loan laws.

Instances where the insurance code expressly *does not* immunize the credit insurance charges are spelled out in 24-A M.R.S.A. §2851. Section 2851 provides that:

"All life insurance and all health insurance in connection with loans or other credit transactions shall be subject to this chapter, *except such insurance in connection with a loan or other credit transaction of more than 5 years duration or issued in an isolated transaction on the part of the insurer not related to an agreement or a plan for insuring debtors of the creditor.*" (Italics added).

An additional instance where the Credit Insurance Law would be implied as not exempting the creditor from the maximum interest limitation would be a situation where the creditor is in substance and effect also the insurer. See, e.g. *Cope v. Aetna Finance Company of Maine,* 412 F.2d 635 (1969).

If a creditor is in substance and effect an instrumentality of the insurer, as it was in the *Cope* case, the insurance would not be considered as being "issued *through* any creditor" as contemplated by subsection 1 of section 2861, supra.

In conclusion, the charges for credit insurance are not to be included in the calculations for determining the maximum interest permissible under 9 M.R.S.A. §229 if such charges are within the scope of 24-A M.R.S.A. § 2861.

Charges should not however be considered as exempt from §229 if the creditor is in substance the insurer, or comes within the exception of 24-A M.R.S.A. §2851.

CLAYTON N. HOWARD
Assistant Attorney General

November 24, 1970
Inland Fisheries and Game

Maynard F. Marsh, Deputy Commissioner

SYLLABUS:

A game warden pilot may not be permitted to continue in State service as a pilot beyond age 60, but he may be permitted to continue in State service as a game warden until age 63 to attain 25 years of State service.

FACTS:

Subject was first employed by the Department of Inland Fisheries and Game on July 31, 1949. Since that date, he has served most of the time in the capacity of a Game Warden Pilot. Subject will reach age 60 on February 27, 1971, at which time he will have less than 25 years of creditable service.

QUESTION:

Can a Game Warden Pilot continue in the service of the Department of Inland Fisheries and Game until he reaches age 63 in order to obtain the necessary 25 years of service to be retired at half pay retirement?

ANSWER:

Yes, but only as a game warden and not as a pilot.

REASONS:

Prior to enactment of Chapter 445 of the Public Laws of 1965 "a warden in the Department of Inland Fisheries and Game" and "an airplane pilot employed by the State of Maine" were compelled to retire upon "the attainment of age 60." 5 M.R.S.A § 1121, subsection 4. However, section 3, Chapter 445 of the Public Laws of 1965 amended 5 M.R.S.A. §1121, subsection 4, paragraph A, subparagraph 1, by deleting therefrom the words:

"or a warden in the Department of Inland Fisheries and Game, or a warden of the Department of Sea and Shore Fisheries."

Section 3 of Chapter 445 of the Public Laws of 1965 also amended 5 M.R.S.A. §1121, subsection 1, by adding thereto a new paragraph D, which reads:

"D. Any law enforcement officer in the Department of Inland Fisheries and Game and any law enforcement officer in the Department of Sea and Shore Fisheries may retire at attained age 50 or upon completion of 25 years of total creditable service as a law enforcement officer in the Department of Inland Fisheries and Game or a law enforcement officer in the Department of Sea and Shore Fisheries, whichever is the later. Retirement shall be compulsory at the attainment of age 60. Except that any law enforcement officer in the Department of Inland Fisheries and Game and any law enforcement officer in the Department of Sea and Shore Fisheries who will not attain the 25 years of creditable service at age 60 may be permitted to continue in his employment until age 63 in order to

obtain the 25 years of creditable service necessary . . . ."

It is apparent that the subject individual occupies dual roles: (1) A "law enforcement officer in the Department of Inland Fisheries and Game." (5 M.R.S.A. § 1121, subsection 1, paragraph D); and (2) "an airplane pilot employed by the State of Maine." (5 M.R.S.A. § 1121, subsection 4, paragraph A, subparagraph (2).) It is equally clear that prior to the above-described amendments of 5 M.R.S.A. § 1121, a person occupying either of these roles was subject to compulsory retirement at age 60. After the foregoing amendments, the pilot is subject to compulsory retirement at age 60, but the game warden may be permitted to continue "until age 63 in order to obtain the 25 years of creditable service necessary."

Since both functions are vested in the one individual, a conflict in statutory provisions arises. A cardinal rule of statutory construction states:

> "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." Sutherland, Statutory Construction, 3rd Edition, Section 4705.

The dual functions, of game warden and pilot, occupied by subject individual, appear to be severable. Therefore, when the above-quoted rule of construction is applied to the problem presented, it is apparent that subject individual may be permitted to continue as a game warden until age 63 in order to attain 25 years of State service; however, he may not be permitted to continue in the function of a pilot employed by the State beyond age 60. This construction gives full, operative effect to both sections of the above-quoted statute. It also conforms to the fairly implicit legislative purpose to liberalize the age limitation upon game wardens but to maintain the prior limitation upon pilot age. This legislative distinction appears to be reasonable.

Accordingly, it is concluded that in the absence of a "request of the Governor with the approval of the Council," pursuant to 5 M.R.S.A. § 1121, subsection 4, paragraph B, the subject individual may not be permitted to continue in State employment as an airplane pilot beyond age 60. However, it is also concluded that the subject individual may be permitted to continue in State employment as a game warden until he reaches age 63 in order to attain 25 years of State service.

It should be noted that 5 M.R.S.A. § 1121, subsection 4, paragraph B, provides the following alternative with regard to pilots:

> "Retirement shall be compulsory at the attainment of age 60 except that on the request of the Governor with the approval of the Council, the board of trustees may permit the continuation for periods of one year, as the result of each such request, of the service of such member."

Accordingly, if the Department of Inland Fisheries and Game especially desired to continue subject individual in the dual roles of game warden pilot, from year to year, it could submit a request to the Governor to seek the above-quoted exceptional action.

CHARLES R. LAROUCHE
Assistant Attorney General

December 3, 1970
Indian Affairs

James H. Murphy, Commissioner

Vacancy in Seat of Representative of Penobscot Indian Tribe

SYLLABUS:

A vacancy in the seat of the Representative of Penobscot Indian Tribe due to death of that Representative is filled by an appointment of Tribal Governor with the advice and consent of the Tribal Council.

FACTS:

In September, 1970, the Penobscot Tribe elected John Nelson as their Representative to the Legislature pursuant to Title 22 M.R.S.A. § 4792, paragraph 1. Subsequent to his election Mr. Nelson deceased.

QUESTION:

Is the vacancy of the seat occupied by John Nelson to be filled by the Tribal Governor and Council pursuant to Title 22 M.R.S.A. § 4792 or as provided in 22 Me. Const. Art. IV, pt. 1, § 6?

ANSWER:

By the Tribal Governor and Council.

REASONING:

The Maine Constitution in Article IV, part 1,§6 refers to vacancies in the seats of Representatives to the Legislature. The Representatives referred to are constitutional representatives as defined in Article IV; that is, those apportioned among the people of the State and elected in general election. In this case that Representative would be the one apportioned to Indian Island Voting District by P. & S.L. 1963, Ch. 233, §1, Mr. Starbird. A vacancy in such a seat would be filled as provided in Article IV, part 1, § 6.

The Representative of the Penobscot Tribe, however, does not come within this definition of a constitutional Representative. He is a creature of the Legislature having only those powers granted by the Legislature. See for example: Title 3, M.R.S.A.§2, which distinguishes between Representatives and Indian Representatives for compensation purposes. The Indian Representative has no vote. He is elected only by the tribe and vacancies are filled as prescribed by the enabling legislation. See again 22 M.R.S.A. § 4792, paragraphs 3 and 4.

> "Only certified members of the tribe who are 20 years of age or older shall be eligible to vote. The commissioner shall give notice of the time and place, 7 days before said day of election, by posting notices thereof, one at his office and one in some conspicuous place on Old Town Island. Said commissioner shall receive, sort and count the votes given in at said election, in presence of the members of the tribe, and shall give to those elected certificates thereof. The governor, lieutenant governor and representative at the Legislature so elected shall hold office for 2 years commencing on the first day of October on the even-numbered years beginning October 1, 1968, or until their successors are elected. At such time, all correspondence, records, files and other materials pertaining to Penobscot tribal government and tribal activities shall be turned over to the newly elected tribal governor by the former tribal officials.
>
> "Whenever any vacancy occurs the commissioner shall call a meeting of the tribe to fill such vacancy. Vacancies shall be filled through appointment by the

tribal governor, with the advice and consent of the tribal council, with preference first given to unsuccessful candidates in the previous election, in descending order of the number of votes cast for such candidates. Vacancies so filled shall be for the unexpired terms. Tribal members who have been convicted of a felony shall not be permitted to hold any tribal office, either elective or appointive."

Although the law states that a Representative shall hold office until his successor is elected, it does not appear to mean that vacancies shall be filled by general election of the tribe. Rather paragraph 4 governs filling of any vacancies. Thus the procedure would appear to be as follows: (1) The Commissioner calls a tribal meeting, (2) the tribal governor nominates a replacement giving preference to prior candidates as prescribed, (3) the Council accepts or rejects nominations until a successor is selected.

JOHN M. R. PATERSON
Assistant Attorney General

December 10, 1970
Division of Probation and Parole

G. Raymond Nichols, Director

Commutation of Sentence Prior to Commencement

SYLLABUS:

The Governor with the advice and consent of the Council may, pursuant to Maine Constitution, Article V, Part 1, §11, commute a sentence of which an inmate at the Maine State Prison is not yet in execution.

FACTS:

An inmate at the Maine State Prison currently in execution of a sentence, and subject to serve a consecutive sentence upon completion of that currently being served, has applied to the Governor for commutation relative to both sentences.

QUESTION:

Has the Governor with the advice and consent of the Council authority to grant a commutation in connection with a sentence of which an inmate at the Maine State Prison is not yet in execution?

ANSWER:

Yes.

REASON:

The power of the Governor with the advice and consent of the Council to grant commutation is found in Maine Constitution, Article V, Part 1, § 11, which reads as follows:

"He shall have power, with the advice and consent of the Council, to remit, after conviction, all forfeitures and penalties, and to grant reprieves,

commutations and pardons, except in cases of impeachment, upon such conditions, and with such restrictions and limitations as may be deemed proper, subject to such regulations as may be provided by law, relative to the manner of applying for pardons. Such power to grant reprieves, commutations and pardons shall include offenses of juvenile delinquency."

We find in this broad grant to the Governor of the pardon and commutation power no restrictive language requiring a convicted offender to be in execution of sentence before such pardon or commutation power might be exercised. Absent such restrictive language we are of the opinion that the Governor with the advice and consent of the Council may grant an inmate at the Maine State Prison a commutation of a sentence imposed, but of which he is not yet in execution.

COURTLAND D. PERRY
Assistant Attorney General

December 15, 1970
Environmental Improvement Comm.

William R. Adams, Director

Minimum Lot Size for Residential Purposes

SYLLABUS:

A lot or parcel of land which is served by a private community sewer may be used for single family residential purposes without conforming to the 20,000 square feet minimum size otherwise required by 12 M.R.S.A. § 4801 (P.L. 1969, c. 365,§1).

FACTS:

A land developer proposes to subdivide a lot or parcel of land into lots upon which single family residences will be erected. The individual lots will be less than 20,000 square feet in size. The developer proposes to lay a pipe from each lot or residence leading to a private community sewer pipe which in turn will lead to a large private community septic tank and leaching field.

QUESTION:

May a land developer subdivide a parcel of land into lots of less than 20,000 square feet per lot when each lot will be served by a pipe leading to a private collector pipe within the meaning and intent of 12 M.R.S.A. § 4801 (P.L. 1969, c. 365, § 1)?

ANSWER:

Yes.

REASONING:

12 M.R.S.A. § 4801 (P.L. 1969, c. 365, § 1) provides:

"In all areas of the State . . . a lot or parcel of land which is *not served by public or private community sewer* . . . shall not be used for single family

residential purposes unless such lot or parcel of land is at least 20,000 square feet in size . . . ." (Italics supplied.)

The obvious intent of this law is to prohibit the disposal of sewage on lots considered by the Legislature to be inadequate in size for that purpose (to wit, lots of less than 20,000 square feet) when such lots are not served by public or private community sewers. When sewage is not disposed of on site, but rather is carried away from the site by a "public or private community[1] sewer"[2] for disposal at a second site, there is no reason to insist upon a minimum lot size of 20,000 square feet to insure adequate sewage disposal.

This opinion in no way relates to any other State or local minimum lot size requirements that may be applicable, nor does it relate to any requirements applicable to the site at which sewage is finally being disposed.

E. STEPHEN MURRAY
Assistant Attorney General

December 23, 1970
Cultural Building Authority

Niran C. Bates, Chairman

Authority of Electrician's Examining Board to Require Construction Changes

SYLLABUS:

Even though the electrical plan of the Cultural Building had been State approved, the Electrician's Examining Board could require changes to meet State standards. The contractor is entitled to additional payment for previously unspecified work. There is no basis for recovery from the architect since there is no indication of failure to exercise reasonable care nor as to extent the ultimate cost would have been less if the initial plan had incorporated the additional requirement.

FACTS:

On June 1, 1967, the Maine State Cultural Building Authority (hereinafter, Authority) entered into an agreement with Walker O. Cain & Associates (hereinafter, Architect) for the preparation of plans and specifications and supervision of the construction of the Maine State Cultural Building. The plans and specifications for such a building, including the electrical plan prepared for the architect by their consulting engineers, Jansen & Rogan, were submitted for final review on January 30, 1969, and were finally approved by the Authority, the Bureau of Public Improvements, (hereinafter, BPI), Insurance Department (signed by the person who was the Director of the Fire Prevention Division and Executive Secretary of the Electrician's Examining Board), and the Bureau of Health, on March 18, 1969. Thereafter, bids were solicited

1) Black's Law Dictionary (4th Ed. 1951), *Community,* "Neighborhood; vicinity, synonymous with locality. . . People who reside in a locality in more or less proximity. . ."

2) Black's Law Dictionary (4th Ed. 1951), *Sewer,* ". . . an artificial (usually underground or covered) channel used for the drainage of two or more separate buildings. . ."

and the contract upon these State approved plans and specifications was awarded to Stewart and Williams, Inc. (the general contractor) and the electrical work was subcontracted to Kerr Electrical Co. Some time after work had commenced on the building and while the electrical installation was in progress, the State Electrical Inspector reported that one aspect of the electrical work in progress failed to comply with the National Electrical Code as required by Maine law. Kerr Electrical Company was then advised of this reported deficiency by a letter from the Executive Secretary of the Electrician's Examining Board, requiring the following corrective action; "Distribution panels that derive there (sic) energy from dry type transformers shall have over-current protection on the load side of the transformers, article 384-16 and article 240-5." A dispute then ensued over the correct interpretation of the above-cited sections of the National Electrical Code (hereinafter, Code). Kerr Electrical Company, Jansen & Rogan and Mr. Crowley (Mechanical Engineer in BPI) contended that such secondary circuit protection was not required by the NEC. Their position is supported by an article in the May 1970 edition of the Electrical Construction and Maintenance magazine. The contra position of the State Electrical Inspector is supported by the opinion of the Chief Electrical Inspector of Chicago and the opinion of the Code Consultant of the International Association of Electrical Inspectors. On June 6, 1970, the dispute was presented to the Maine Electrician's Examining Board which then upheld the decision of the State Electrical Inspector. The architect's consulting engineers then submitted a revised electrical plan to carry out that decision, which plan was then approved by the State Electrical Inspector. On July 16, 1970, the general contractor submitted a proposal to accomplish this additional electrical work "on a time and materials basis with a TOTAL UPSET PRICE NOT TO EXCEED $8,268.00" which proposal was accepted by the Authority.

QUESTIONS:

1. Does the State of Maine Electrician's Examining Board have authority after approval of contract plans by the Department of Insurance and during the course of construction to require changes in the electrical system?
2. Is the Authority required to make the changes as indicated by the Electrician's Examining Board and to assume the costs incurred by the changes?
3. Does the Authority have any legal basis to collect this additional expense (See Item 16 attached, Pending Change Order No. 105C-$8,268.) from either the Architect or the General Contractor?

ANSWERS:

1. Yes.
2. Yes.
3. No.

REASONS:

32 M.R.S.A. Chapter 17 applies to all electrical installations within this State except those which are expressly exempted by §1102 of that chapter. Authority and BPI are not included within any of the exceptions listed in that §1102. The Legislature has directed that all nonexempted electrical installations –

"shall comply with the current edition of the National Electrical Code, pamphlet

No. 70, published by National Fire Protection Association and with applicable statutes of the State and all applicable ordinances, orders, rules and regulations of any city or town or the Electricians Examining Board." 32 M.R.S.A. §1153-A. (P.L. 1967, c. 69, §5, effective October 7, 1967.)

It has also provided that:

"Whenever any state electrical inspector shall find any electrical installation in any building or structure which does not comply with this chapter, he shall order the same to be removed or remedied and such order shall forthwith be complied with by the owner or occupant of such premises or buildings. Such owner or occupant may, within 24 hours, appeal to the Electricians Examining Board, which shall within 10 days review such order and file its decision thereon, and its decision shall be complied with within such times as may be fixed in said decision of the Electricians Examining Board." 32 M.R.S.A. §1104.

It is apparent that the legislature has prescribed certain standards for nonexempt electrical installations, that it has reposed the responsibility for insuring compliance with these standards in the Electrician's Examining Board, acting primarily through its appointed state electrical inspectors and finally as an appellate body. It is also clear that this responsibility is a continuing one, that it does not cease upon approval of contract plans, but that these officials are required to act in full accordance with the legislative mandate "whenever" they discover a noncompliance with the standards prescribed by the Legislature. *CJS, Municipal Corporations § 173.*

"It [a permit] may be revoked when it has been issued without authority or in violation of the regulations; * * * * " (Id.)

The safety of the public must be guarded according to the view of the legislature and not according to the initially mistaken view of the regulating agency. *Altschul v. Ludwig,* 166 N.Y.S. 529.

While such a power does authorize the state electrical inspectors and the Electrician's Examining Board to rectify oversights, implicit within the legislative mandate is the duty to exercise it diligently in order to avoid undue expense to the individual and to the State. Nevertheless, the first and second questions must be answered in the affirmative.

With regard to the third question, there is no perceivable basis for charging the cost of the additional electrical installation to the general contractor. After being presented a set of plans and specifications that had been approved by all the requisite agencies of this State, *including the agency regulating electrical work,* the contractor submitted an offer to perform the specified work at a certain price, which offer the State accepted.

In submitting its bid to the State, the contractor was entitled to rely upon the State's representation that the architect's electrical plan fulfilled Maine electrical standards. During the course of construction, which was being performed in compliance with the State approved electrical plan, the State electrical regulating agency announced that the initial plan was inadequate and that certain additional electrical installations were required in order to comply with Maine electrical standards. However, the State was bound contractually by its first representation of adequacy. Accordingly, the general contractor was fully justified in requesting additional payment for additional work which had not been specified in the State approved bid request.

With regard to the architect, it appears that he has fully complied with his contract. The question presented relates to whether or not the architect submitted "adequate" plans, including plans in full compliance with the laws of the State. The initial electrical plan was accepted by the State, after approval for adequacy by the agencies of this State responsible for such determination. Upon further reconsideration of the electrical plan, while construction was in progress, the State Electrical Inspector discovered, and the

Electrician's Examining Board agreed with him, that the initial electrical plan was inadequate. The initial approval of the electrical plan by the State did not relieve the architect from responsibility for submission of an adequate plan. See paragraph IV (a), Instructions to Architects and/or Engineers for the Development of Plans and Specifications for State Project, incorporated by reference in paragraph IV A of the contract between CBA and the architect. Upon notification of the subsequent determination of inadequacy of the initial plan, based upon a disputed interpretation of the NEC, the architect submitted a revised electrical plan which is now deemed adequate.

If the initial plan had incorporated all of the requisite work, the State would have had the benefit of competitive bidding; while this might have reduced somewhat the $8,268 figure for such additional work, the material presented contains no facts upon which to base a determination of the extent of any such reduction. But even if the extent of such a loss could be determined, the architect is only liable therefor if the loss resulted from a failure on his part to exercise reasonable care. *CJS, Architects §19.* The Code Consultant for the International Association of Electrical Inspectors concedes that the pertinent sections of the Code are ambiguous and that "an effort is now being made to clarify the rules in the Code for secondary overcurrent protection." The architect's consulting engineers still dispute, with some supporting authority, the correctness of that interpretation which was finally adopted by the Electrician's Examining Board. *Furthermore, the Secretary of that Board had previously approved the initial plan without comment.* Under these circumstances, no substantial basis exists for concluding that the architect had failed to exercise reasonable care in preparing the initial electrical plan. Accordingly, the third question must be answered in the negative.

CHARLES R. LAROUCHE
Assistant Attorney General

January 11, 1971
Parks and Recreation Commission

Lawrence Stuart, Director

Participation of the Maine State Parks and Recreation Commission in the Historic Preservation Program Established by 16 U.S.C. §§ 470-a – 470-m, Pub. L. 89-665 (1966).

SYLLABUS:

The Maine State Parks and Recreation Commission has no authority to participate in the "program for preservation of additional historic properties" established by Pub. L. 89-665 (1966) (16 U.S.C.§§470-a to 470-m).

FACTS:

16 U.S.C. §§470-a – 470-m (1966) (Pub. L. 89-665) entitled "An Act to establish a program for the preservation of additional historic properties throughout the Nation, and for other purposes." provides for financial aid grants to states for "the acquisition of title or interests in and for the development of, any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture . . . in order to assure the preservation for public benefit of any such historical properties." In

connection with such grants, the law requires the grantee state "to assume, after completion of the project, the total cost of the continued maintenance, repair and administration of the property in a manner satisfactory to the Secretary (of the U.S. Department of the Interior)".

The United States Department of the Interior has, in a memorandum dated October 20, 1970, construed the requirement that the grantee state assume "the total cost of the continued maintenance etc." to allow the grantee state to satisfy the Secretary either (1) by making a "contractual commitment to the Federal Government that it will be solely responsible for the continued maintenance, etc." or (2) by requiring "the owner of a private site to enter into an enforceable contract to maintain, etc." and allowing the state to perform necessary maintenance and repair at the owner's expense if the owner fails to maintain the site properly" or (3) by acquiring an "easement" and assuming the costs of maintenance, etc.

QUESTION:

Does the Maine State Parks and Recreation Commission, hereafter called the Commission, have the authority to participate in the "program for the preservation of additional historic properties" established by Pub. L. 89-665, with respect to either public or private properties?

ANSWER:

No.

REASONING:

Pub. L. 89-665 contemplates the acceptance of Federal funds for the purpose of acquiring and developing "any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture . . . in order to assure the preservation for public benefit of any such historical properties" (16 U.S.C. § 470-a (a) (2).)

12 M.R.S.A. § 602, subsec. 9 empowers the Commission "to accept and receive funds from the Federal Government for all purposes relating to *parks* and *recreational* areas" (italics supplied.). The Legislature has distinguished between "memorial"[1] (meaning land or structures with "historical, archeological or scientific interest or value") and "park"[2] (meaning areas of "recreational value"). Thus, since 12 M.R.S.A. § 602, subsection 9 does not specifically authorize the Commission to accept funds for purposes relating to "memorials", the Commission is without authority to accept such funds.

Even if the Commission were authorized to accept Federal funds for purposes relating to "memorials", it would be unable to accept such funds for use in connection with a private "memorial" for the reasons that: (1) 12 M.R.S.A. § 602 grants the Commission "jurisdiction, custody and control in, over and upon all state parks and memorials and national parks which are under control and management of the State"

1) 12 M.R.S.A. § 601, subsec. 1.

2) 12 M.R.S.A. § 601, subsec. 2.

and thus the Commission has no "jurisdiction" over "private memorials"; (2) 12 M.R.S.A. § 601, subsection 1 defines "memorials" to include only land and buildings established "for public use"; and (3) in order to "aset apart and publicly proclaim areas of land in this State including improvements, or other structures thereon, . . . as . . . memorials" the Commission must have acquired "title"[3] to the said land and structures. (See 12 M.R.S.A. § 602, subsection 3.)

E. STEPHEN MURRAY
Assistant Attorney General

January 8, 1971
Labor and Industry

Madge E. Ames, Director
Div. of Minimum Wage

Farnsworth Library and Art Museum

SYLLABUS:

Employees of the Farnsworth Library and Art Museum are "engaged in . . . a program controlled by an educational non-profit organization", provided that their employment directly related to the basic functions of the organization.

FACTS:

The William A. Farnsworth Library and Art Museum, Rockland, Maine, is a non-profit organization offering to the general public the opportunity to view works of art and a reference library. The museum employs certain personnel without paying minimum wage. Title 26 M.R.S.A. §624 prescribes the minimum wage to be paid "employees". Section 663 (3) (E) exempts from the definition of "employee"

> "Any individual engaged in the activities of a public supported non-profit organization or in a program controlled by an educational non-profit organization . . . ."

QUESTION:

Are employees of the Farnsworth Museum "engaged in . . . a program controlled by an educational non-profit organization"?

ANSWER:

Yes, provided their employment directly relates to the basic functions of the organization.

3) Acquisition of an "interest" or "easement" by the Commission would not be acquisition of "title". See "easement", "interest" and "title", *Black's Law Dictionary*, pp. 599, 950 and 1655 (4th ed. 1951).

REASONING:

Though issue of whether a museum or library is an educational organization or institution has not been decided in Maine case law, numerous citations exist from other jurisdictions which define museums and libraries as educational. In fact, this appears to be the almost unanimous view of those courts that have considered the question: *In Re Arnot's Estate,* 130 N.Y.S. 499 (1911); *People ex. rel. Frick Collection v. Chambers,* 91 N.Y.S.2d 525 (1959); *United States v. Proprietors of Social Law Library,* 102 F.2d 481 (1st Cir. 1939); *Inhabitants of Town of Essex v. Brooks,* 41 N.E. 119 (Mass. 1895); *Board of Trustees of Newport Public Library v. City of Newport,* 187 S.W.2d 806, 300 Ky. 125 (1945) and *Tomay et al. v. Crist,* 226 P. 156, 75 Colo. 437 (1924). As the Court stated in *Matter of Moses,* 123 N.Y.S. 443:

> "educational is not used in its meaning of instruction by school, college, or university, which is a narrower and more limited meaning of the word (Century Dictionary), but in its broader signification as the act of developing and cultivating the various physical, intellectual and moral faculties, toward the improvement of the body, the mind and the heart." at p. 446.

The Court in *Tomay et al. v. Crist,* supra, aptly summarized the decisions on this issue when it said:

> "That a library association is educational and therefore within the terms of the statute hardly requires the citation of authorities."

The mere fact that such questions have been decided in cases involving tax law appears to be irrelevant to the substance of such decisions.

The only question remaining is whether the employee is engaged in a "program controlled" by the Farnsworth Library and Museum. It is clear that the term "program" was not intended to mean a particular course of study or a general curriculum leading to a degree. Rather, the term "program" is used in the sense of "activity" as mentioned in the same sentence with reference to "public-supported non-profit organizations". In fact the two terms appear to be substantially synonymous. Since the normal "program" of the museum includes librarian, teaching, lecture and related "activities", the requirements of § 663 (3) (E) are satisfied. Such employees are not covered by the minimum wage requirements of 26 M.R.S.A. §664.

However, the statute in question does not exempt *all* employees of educational non-profit organizations, but only those engaged in a "program controlled by" such an organization. There is a significant difference. It is apparent that the statutes does not intend to exclude employees engaged in janitorial, custodial or maintenance capacities, but rather only those whose employment directly relates to the basic museum and library functions of the organization. In each case a determination must be made as to whether the individual employee is engaged in the basic activity referred to, or whether in fact his type of work is entirely unrelated to the purpose of the organization. Since no specific facts regarding an individual employee have been presented, we do not render an opinion on that issue.

JOHN M. R. PATERSON
Assistant Attorney General

March 1, 1971
Insurance

Harold E. Trahey, 1st Deputy
Unclaimed Funds of Life Insurers

SYLLABUS:

Three-fourths of any unclaimed funds of life insurers received by the Insurance Commissioner must be paid into the State Treasury forthwith. There is no authority to retain more than one-fourth in the special trust fund in order to achieve a $1,000 minimum plus anticipated publication costs.

FACTS:

On January 1, 1970, the Unclaimed Funds Act of Life Insurers, Chapter 61 of Title 24-A, became effective. Section 4554 thereof requires every life insurer to make a written report to the Insurance Commissioner on or before May 1 of each year as to all unclaimed funds held and owing by it on December 31 of the preceding year. Section 4555 requires the Commissioner to publish notices on or before September 1 concerning these reported unclaimed funds. Section 4556 provides that such unclaimed funds shall be paid to the Commissioner on or before the following December 20. Section 4557 requires the State to assume custody of such funds for the benefit of those entitled to receive same. Section 4559 makes the following provisions for administration of the unclaimed funds turned over to the Commissioner:

> "Upon receipt of any unclaimed funds from life insurers by the Commissioner, he shall pay forthwith three-fourths of the amount thereof into the State Treasury for credit to the General Fund of the State for the use of the State. The remaining one-fourth shall be administered by him as a special trust fund for the purposes of this chapter, and deposited in the manner provided by law for the deposit of such funds. At the end of each calendar year, any unclaimed funds which shall have been a part of such special trust fund for a period of 7 years or more shall be paid into the General Fund of the State for the use of the State, but the special trust fund shall never be so reduced to less than $1,000."

It appears from the reported facts that during the calendar year 1970, $2,534.98 in unclaimed funds were received from life insurers; that three-fourths of this amount, $1,901.23, was immediately turned over to the State Treasury for credit to the General Fund of the State; that the remaining one-fourth, $633.75, was retained by the Commissioner in a special trust fund; and that the cost of publication of the notices required by Section 4555 in connection with such funds amounted to $716.52. Section 4555, subsection 5, provides that:

> "The expenses of publication shall be charged against the special trust fund provided for in section 4559."

QUESTION:

Whether or not all unclaimed funds from life insurers could be deposited in the special trust fund account until the minimum of $1,000.00 is reached plus a requisite amount of $725.00 to meet the publications costs.

ANSWER:

No.

REASONS:

The first sentence of section 4559 states that three-fourths of any unclaimed funds received by the Commissioner must be paid *forthwith* into the State Treasury. This appears to be a clear, unqualified, peremptory mandate. The second sentence of section 4559 directs the Commissioner to administer the remaining one-fourth as a special trust fund; nothing therein limits the preceding requirement to deliver three-fourths to the State Treasury. The third sentence of section 4559 provides for payment into the State Treasury of those unclaimed funds that have remained in the special trust fund for seven years; however, here we find a qualification upon the requirement to turn funds into the State Treasury, providing that "the special trust fund shall never be so reduced to less than $1,000." Nevertheless, this provision has no relationship to the initial requirement to pay into the State Treasury three-fourths of the unclaimed funds forthwith. While section 4555, subsection 5, does provide that "expenses of publication shall be charged against the special trust fund," such a provision does not purport to limit the requirement in section 4559 to pay three-fourths into the Treasury forthwith, but merely authorizes payment of outstanding publication costs from the special trust fund. Section 4557 declares that the State shall assume custody of those funds for the benefit of persons entitled to receive the same, and section 4558 recognizes that the special trust fund may, on occasion, be insufficient for payments to such persons, in which event the Commissioner is authorized to make such payments out of the General Fund of the State. Accordingly, it is clear that there is no implied authority to pay into the State Treasury forthwith less than three-fourths of unclaimed funds received by the Commissioner.

CHARLES R. LAROUCHE
Assistant Attorney General

March 12, 1971
Maine State Prison

Allan L. Robbins, Warden

Authority of State Probation and Parole Board to Terminate Life Sentence, Permitting Execution of Sentence for Escape.

SYLLABUS:

In accordance with authority vested in the State Probation and Parole Board by Title 34, § 710 the life sentence being served by an inmate at the Maine State Prison may be terminated by the State Probation and Parole Board, such termination power being in addition to parole authority vested in the Board by Subchapter V. of Chapter 121 of Title 34 and such inmate, following termination of the life sentence, shall begin execution of the sentence for escape. In such case the 10 year parole supervision provision of Title 34, §1678 would be inoperative, since the inmate at the time of parole would not be serving a life sentence.

FACTS:

An inmate at the Maine State Prison currently in execution of a life sentence imposed upon him December 4, 1959, escaped from the Minimum Security Unit of the Maine

State Prison on October 25, 1970, and was convicted of such offense on February 18, 1971, and sentenced to the Maine State Prison for a term of 1-2 years, but for the new sentence for escape this inmate would have been eligible for parole consideration on or about March 31, 1972.

QUESTION:

May the State Probation and Parole Board dispose of the case of an inmate serving a life sentence, permitting execution of a sentence for escape and if so, is duration of parole affected?

ANSWER:

Yes, as to both parts.

REASON:

Statutes pertinent to the opinion of this office relative to the question here presented are as follows:

> Title 34, M.R.S.A. 1964, § 710
>
> "If a convict sentenced to the State Prison for life or for a limited term of years or transferred thereto from the Men's Correctional Center under section 808-A or committed thereto for safekeeping under Title 15, section 453, assaults any officer or other person employed in the government thereof, or breaks or escapes therefrom, or forcibly attempts to do so, he may be punished by confinement to hard labor for any term of years, to commence after the completion of his former sentence or upon termination of such sentence by the State Probation and Parole Board; said termination shall not take place sooner than the expiration of the parole eligibility hearing date applicable to his former sentence. The warden shall certify the fact of a violation of this section to the county attorney for the County of Knox, who shall prosecute such convict therefor."
>
> Title 34, M.R.S.A. 1964, § 1678
>
> "Whenever it appears to the board that a person on parole is no longer in need of supervision, it may order the superintendent or warden of the institution from which he was released to issue him a certificate of discharge, except that in the case of persons serving a life sentence who may not be discharged from parole in less than 10 years after release on parole."

The Legislature in Title 34, § 710 has made specific reference to persons serving life sentences, as well as to other categories of inmates, and has provided that a sentence for escape shall be served upon completion of the sentence being served at the time of escape or termination thereof by the State Probation and Parole Board and has fixed the time at which such termination may take place.

Parole authority is vested in the State Probation and Parole Board in Subchapter V of Chapter 121 of Title 34. We find in section 710 of Title 34 an additional power vested in the State Probation and Parole Board, viz., the power to terminate a sentence being served by an inmate following parole hearing eligibility in order to permit execution of another sentence, i.e., for escape. Termination of a sentence as provided for in section 710 is not parole, such disposition being release from the institution. A person is not

paroled to another sentence but the sentence being served is terminated and the inmate begins execution of another sentence.

In consideration of the question presented here the import of 34 M.R.S.A., 1964, §1678 is intelligible from its language, such section providing that a person serving a life sentence shall be on parole for not less than 10 years. We dispose of this question by stating that a person serving a life sentence who escapes from the Maine State Prison and whose life sentence is terminated pursuant to authority vested in the State Probation and Parole Board by Title 34, § 710, and who is commenced in execution of a sentence for escape will never be paroled in connection with the life sentence. Parole in such instance, if it is ordered, will be in connection with the sentence for escape. The appropriate disposition of the case of an inmate serving a life sentence who faces execution of a sentence for escape is a matter discretionary with the State Probation and Parole Board, the Board bearing in mind that the 10 year parole supervision provision of Title 34, §1678 will never be operative as to the inmate after the Board exercises its authority and terminates the life sentence.

In reaching the conclusion reached here we find that protection of the public, in the instance of parole of an inmate serving a life sentence by mandatory 10 year parole supervision is diminished in the case of the inmate serving a life sentence who commits an offense covered by Title 34, §710, when the State Probation and Parole Board exercises its authority by termination of a life sentence, permitting execution of the sentence imposed for the offense covered by the latter section. When finally paroled the inmate will be subject to parole supervision only for the duration of the sentence for such offense – in the case of the inmate in question such supervision may approximate one year. We are constrained, however, to conclude that the language of Title 34, § 710 clearly and specifically relates to persons serving life sentences and is remedial in that it provides a means by which an inmate serving a life sentence who commits an offense covered by Title 34, § 710, may be returned to the community. The burden rests with the State Probation and Parole Board to determine the propriety of termination of the life sentence, permitting execution of the sentence imposed under Title 34, § 710, and ultimate release absent the 10 year mandatory parole supervision which would otherwise obtain.

In summary we are of the opinion that in accordance with authority vested in the State Probation and Parole Board by Title 34, § 710, the life sentence being served by an inmate at the Maine State Prison may be terminated by the State Probation and Parole Board, such termination power being in addition to parole authority vested in the Board by Subchapter V of Chapter 121 of Title 34 and such inmate following termination of the life sentence, shall begin execution of the sentence for escape. In such case the 10 year parole supervision provision of Title 34, § 1678 would be inoperative, since the inmate at the time of parole would not be serving a life sentence.

COURTLAND D. PERRY
Assistant Attorney General

April 5, 1971
Bureau of Corrections

Ward Murphy, Director

Use of Portion of Boys Training Center Diagnostic Unit General Fund Bond Issue Proceeds for Alterations to Security and Infirmary Building.

SYLLABUS:

Where the Legislature has provided for the allocation of proceeds from a General Fund Bond Issue for a "Diagnostic Unit" at the Boys Training Center, the expenditure of such proceeds is legally permissible for the construction of a new building and the alteration of a portion of an existing building, the composite of which, upon completion, will be the "Diagnostic Unit" at such institution.

FACTS::

The 104th Legislature in Special Session authorized a General Fund Bond Issue, a portion of the proceeds of which, by the language of the Act P&SL 1970, Chapter 240 was allocated for:

"Mental Health and Corrections, Department of
Boys Training Center Diagnostic Unit
$375,000"

It is proposed that the Diagnostic Unit to be constructed at the Boys Training Center consist of a new building and a portion of the Security and Infirmary Building altered in certain respects to provide the following:

1. An area for academic tutoring on a 1-1 or a 1-2 basis so that the academic program can be continued in the treatment of the boy while in security.
2. An area for consultation on a 1-1 or a 1-2 basis so that counseling from the social services of the institution may continue while the child is in security.
3. An area in which a boy or boys may be involved in limited recreational activities as he progresses in his program within this area.

This proposal assures the nonduplication of specialized institutional buildings or portions of buildings. The estimated cost of alterations to the Security and Infirmary Building to permit its use as a part of the Diagnostic Unit is $54,000.

QUESTION:

Does there exist any legal prohibition against expending a portion of the proceeds from the General Fund Bond Issue authorized by P&SL 1970, Chapter 240 in the alteration of the existing Security and Infirmary Building at the Boys Training Center for the purpose of permitting the use of an area in such building as a part of the Diagnostic Unit authorized to be constructed at the institution?

ANSWER:

No.

REASON:

P&SL 1970, chapter 240 provides in pertinent part:

" . . . . .The proceeds of the sales of such bonds, which shall be held by the Treasurer of State and paid by him upon warrants drawn by the Governor and Council, are appropriated to be used solely for the purposes set forth in this Act . . . . "

"Sec. 6.
"Mental Health and Corrections, Department of
Boys Training Center
Diagnostic Unit

$375,000"

The Legislature with reference to the use of proceeds from that portion of the Bond Issue designated for construction at the Boys Training Center refers to "Diagnostic Unit." We consider this language to refer more to the ultimate function for which the constructed facility is to be used than to the location or physical attributes of the proposed construction. We have addressed ourselves, from time to time, to similar questions with reference to the use of proceeds from General Fund Bond Issues, e.g., an Opinion of this office was issued on December 11, 1969, with reference to the use of proceeds from a General Fund Bond Issue, wherein the Legislature made specific reference to an "Addition Gould Academic Building." We express the opinion, in connection with the last quoted language, that General Fund Bond Issue proceeds were required to be expended upon construction of the specified building addition.

We do not find such restrictive language in P&SL 1970, chapter 240. The Legislature has not provided for the construction of a particular building or an addition thereto, or renovations thereof, but has spoken in terms of a "Unit" to be used for an institutional purpose, i.e., "Diagnostic." We do not find a departure from the intended purpose of the General Fund Bond Issue Act in the proposed use of the proceeds from the Bond Issue in the construction of a building and the alteration of a portion of the Security and Infirmary Building, wherein the composite of such construction and alteration, upon completion, will be the "Diagnostic Unit" at the Boys Training Center. Such construction and alteration shall, of course, be accomplished through the expenditure of not more than the amount of $375,000 allocated by the Legislature for the Boys Training Center "Diagnostic Unit."

COURTLAND D. PERRY
Assistant Attorney General

April 23, 1971
Maine State Retirement

Edward L. Walter, Ex. Secretary

Creditable Service for Service to Parochial Schools & Academies

SYLLABUS:

Public School teachers, after completing 10 years of service in public schools in this State, may purchase up to 10 years of creditable service for their service in parochial schools or public or private academies provided that the service was performed in parochial schools or academies located within this State.

FACTS:

Relying on 5 M.R.S.A. § 1094 subsection 14, a public school teacher, who has had more than 10 years of service in public schools in this State, has made application with the Retirement System for permission to purchase credit for service performed in and out-of-state parochial school.

QUESTION:

Whether, pursuant to 5 M.R.S.A. § 1094 subsection 14, a teacher who has rendered service in an out-of-state parochial school may include those years of service, after payment, as creditable service.

ANSWER:

No.

REASON:

The first two sentences of 5 M.R.S.A. § 1094, subsection 14 provide:

> "Private and parochial school credit. Any public school teacher who rendered teaching service in any parochial school or public or private academy may purchase up to 10 years creditable service. Such service credit to be creditable must have been performed in a school approved by the State Department of Education while holding the appropriate teaching certificate during the time of said non-public school service, and such prior service credit can only be secured after 10 years of service in the public schools . . . . ."

The requirement that the service be performed in a parochial school " . . . . approved by the State Department of Education while holding the appropriate teaching certificate during the time of said non-public school service . . . . " necessarily implies that the non-public school be located within this State.

The State Department of Education does not have jurisdiction over schools beyond the borders of this State and any "appropriate teaching certificate" issued in this State would not necessarily entitle one to teach in an out-of-state school.

If the Legislature intended to extend the benefits of this State's Retirement System to service performed by a then out-of-state employee it should do so with clear and express language. Absent any such expressed intent of the Legislature it must be presumed that the legislatively expressed purpose of the Retirement System, to wit; " . . . for the purpose of providing retirement allowances and other benefits under this chapter for employees of this State", was to apply to service performed by state employees while they were employees within this State.

In conclusion, the service performed in an out-of-state parochial school may not be considered teaching service for purposes of 5 M.R.S.A. § 1094 subsection 14.

CLAYTON N. HOWARD
Assistant Attorney General

April 27, 1971
Environmental Improvement Comm.

George C. Gormley, Chief
Bureau of Water Pollution Control

Eligibility of Residents of Unorganized Territory for Preliminary Planning Grants.

SYLLABUS:

Residents of unorganized territory are ineligible under 38 M.R.S.A. § 412 to receive grants from the Environmental Improvement Commission for preliminary planning of pollution abatement facilities.

FACTS:

The Town of Stockholm, acting through its municipal officers, and the inhabitants of the unorganized territory known as T. 16, R. 4, acting through the County Commissioners for the County of Aroostook, have indicated their intent to make a joint application to the Environmental Improvement Commission under the provisions of 38 M.R.S.A. § 412 for a grant to cover their expenses incurred in preliminary planning of pollution abatement facilities.

The reference statute authorizes the Commission to make such grants to " . . . municipalities, quasi-municipal corporations, regional planning commissions and councils of governments . . .".

QUESTION:

Are the residents of the unorganized territory eligible for a preliminary planning grant under 38 M.R.S.A. § 412?

ANSWER:

No.

REASON:

The Legislature has specified those entities eligible to receive preliminary planning grants. Residents of unorganized territory have not been included.

We point out, however, that nothing prevents the municipality from making the application covering both the municipality and the unorganized territory, and at the same time entering into an inter-local cooperation agreement with the county commissioners acting on behalf of the residents of the unorganized territory in order to administer the grant.

ROBERT G. FULLER, JR.
Assistant Attorney General

May 5, 1971
Treasury Department

Norman K. Ferguson, State Treasurer

Location of Trust Company or Banking Institution for Bank Stock Tax Purposes

SYLLABUS:

THE PORTION OF THE BANK STOCK TAX ATTRIBUTABLE TO SHARES OWNED BY NONRESIDENTS AND CORPORATIONS MUST BE RETURNED TO THE MUNICIPALITY WHERE THE PRINCIPAL OFFICE OF THE TRUST COMPANY OR BANKING INSTITUTION IS LOCATED.

FACTS:

A number of Maine trust companies and banking institutions have branch offices in

municipalities other than the municipality where the principal office of the trust company or banking institution is located. A bank stock tax is assessed by the State Tax Assessor on the value of the shares of the trust company or banking institution after making adjustments for the value of real estate, vaults and safe deposit plant. There is a statutory obligation on the part of trust companies and banking institutions to pay the assessment to the State Tax Assessor who pays over all receipts from the tax to the Treasurer of State. The portion of the tax attributable to shares of stock owned by nonresidents or corporations must be returned by the Treasurer of State to the municipality in which the trust company or banking institution is located.

QUESTION:

Where is a trust company or banking institution located for purposes of returning the portion of bank stock attributable to shares owned by nonresidents and corporations?

ANSWER:

In the municipality where the principal office of the trust company or banking institution is located.

REASONS:

The pertinent statutory language to be construed is as follows:

> "The tax assessed under sections 4751 and 4752 upon shares of such trust company or banking institution owned by nonresidents or by corporations shall be returned by the Treasurer of State, on or before the first day of August, *to the municipality* in which such trust company or banking institution is located . . . ." 36 M.R.S.A. 4753 *emphasis supplied.*

The statutory language refers to " . . . *the municipality* in which such trust company or banking institution is located . . . ." This language does not contemplate more than one municipality otherwise language would have been used such as *"the municipalities* in which such trust company or banking institution is located."

The municipality where the principal office of a trust company or banking institution is located is the municipality designated in two certificates filed with the Secretary of State as the municipality where the business of the trust company or banking institution is to be transacted. The two certificates referred to are the Certificate of Organization and the certificate issued by the Bank Commissioner authorizing the trust company or banking institution to transact business. In these certificates filed with the Secretary of State there are often references to branch locations where the trust company or banking institution will carry on business. However, as only one location is contemplated by the statute, the one location is the principal place of business and not a branch location.

JEROME S. MATUS
Assistant Attorney General

May 6, 1971
Aeronautics

Linwood F. Wright, Director

"Airport Construction Fund"; Aroostook Regional Airport Authority; Construction Grant Re Northern Aroostook Airport.

SYLLABUS:

The Director of Aeronautics, with the consent of the Governor and Council, may grant moneys from the "Airport Construction Fund" to a regional airport authority formed by a group of towns under an interlocal cooperation agreement.

FACTS:

The 104th Legislature, at special session, appropriated $57,500 captioned for use concerning "Northern Aroostook Airport", placing said moneys in the Department of Aeronautics. *P.&S. Laws, 1969, c.254.* The reference legislation carried an emergency preamble and became effective February 10, 1970.

Pursuant to the provisions of 30 M.R.S.A. §1951 – 1958 (Interlocal Cooperation), several municipalities in Aroostook County executed an agreement creating the Northern Aroostook Regional Airport Authority. A copy of the agreement is attached hereto and made a part hereof. On the date when the agreement was approved in this office, July 14, 1969, the following municipalities had executed the Interlocal Cooperation Agreement: Fort Kent, Frenchville, Madawaska, New Canada Plantation, St. Agatha, St. John Plantation and Wallagrass Plantation.

The provisions of 6 M.R.S.A. §162, subparagraphs 1 through 3, specify that the Director of Aeronautics shall bienially recommend to the Legislature that it appropriate sums of money deemed necessary to aid in the construction, extension and improvement of State, county or municipal airports in Maine and also provides for the manner in which such moneys are granted to cities, towns or counties separately or cities and towns jointly for said purposes. Grants may be made with the consent of the Governor and Executive Council in an amount not to exceed 50% of the total cost of the construction, extension or improvement of an airport.

Examination of the records of the Secretary of State's Office indicates that the Interlocal Agreement proposing the creation of the Northern Aroostook Regional Airport Authority has not yet been filed with the Secretary of State pursuant to the provisions of 30 M.R.S.A. §1954.

QUESTION:

Can the Director of Aeronautics, with the consent of the Governor and Council, grant moneys to the Northern Aroostook Regional Airport Authority, appropriated by the Legislature, in an amount not to exceed 50% of the total cost of the construction of the Northern Aroostook Airport?

ANSWER:

Yes, provided the Authority first files a copy of the Interlocal Agreement with the Secretary of State.

REASONS:

When the Agreement is filed as required by law (30 M.R.S.A. §1954), then the provisions of 6 M.R.S.A. §162 authorize the payment of construction moneys from the "Airport Construction Fund" to the Authority because the several municipalities are towns which have joined within the purview of said statute for the express purpose of

constructing, maintaining and operating an all-season airport serving the Upper St. John River Valley in Aroostook County. (See Agreement annexed, page 1.)

"2. State aid.

"The director with the consent of the Governor and Council may from the amount appropriated to aid in the construction, extension and improvement of state, municipal or county airports, known as the 'Airport Construction Fund' grant to cities, towns or counties separately and *cities and towns jointly with one another* or with counties an amount not to exceed 50% of the total cost of the construction, extension or improvement of such airport or airports." (Emphasis supplied.)

JOHN W. BENOIT, JR.
Deputy Attorney General

May 6, 1971

Fred E. Holt, Deputy Commissioner

Extent of Forest Commissioner's Jurisdiction under 12 M.R.S.A. §514

SYLLABUS:

The jurisdiction of the Forest Commissioner over naturally occurring great ponds with artificially raised waters begins at the artificial mean low-water mark.

FACTS:

Pond P was, in its natural state, a "great pond" within the meaning of the Colonial Ordinance of 1641–47. Approximately a century ago a dam was constructed at the outlet, raising the water level. Pond P presently has a surface area in excess of 30 acres and its shore is owned by several littoral proprietors.

One of these proprietors wishes to dredge in a bog which is above the *natural* low-water mark of Pond P and which, but for the dam, would be dry land. However, because of the impoundment, the bog is flowed by the waters of Pond P for a portion of each year.

QUESTION:

Does the littoral proprietor need a permit to dredge the bog?

ANSWER:

To the extent that the bog is below the artificial mean low-water mark of Pond P, yes.

OPINION:

12 M.R.S.A. § 514 invests the Forest Commissioner with regulatory authority over "lands specified herein under the direction of the Governor and Council and on such terms as they direct." Subsection 3, paragraph B of section 514 empowers the

Commissioner to grant permits to dredge in "great ponds." Paragraph C of the same section broadens the definition of the term "great pond" beyond the Colonial Ordinance definition to include a body of water "artificially formed or increased from natural size which has a surface area in excess of 30 acres at all times, the shore of which is owned by 2 or more persons, firms or corporations."

It is undisputed that Pond P is a "great pond" as defined by paragraph C. The question presented is whether the bog is part of the pond for purposes of the Forest Commissioner's jurisdiction. The State's title to the bed of a natural great pond begins at the natural low-water mark. *Fernald v. Knox Woolen Co.*, 82 Me. 48 (1889). We consider it reasonable to assume that the Legislature, in enacting section 514, intended the regulatory authority of the Forest Commissioner to commence at the artificial mean low-water mark of artificially increased great ponds.

Accordingly, we are of the opinion that on the facts presented the Forest Commissioner may grant a permit to dredge in such portion of the bog as lies below artificial mean low-water mark of Pond P. The portion of the bog above artificial mean low-water mark is not within the sphere of the Commissioner's jurisdiction.

ROBERT G. FULLER, JR.
Assistant Attorney General

June 1, 1971
Education

Carroll R. McGary, Commissioner

Providing Educational Opportunities for Physically Handicapped or Exceptional Children "within practical limits".

We acknowledge receipt of your inter-departmental memorandum dated April 29, 1971.

SYLLABUS:

The phrase, "within practical limits", as used in the statutes respecting educational opportunities for physically handicapped or exceptional children, means the providing of reasonable or feasible special education by administrative units, as determined by the State Board of Education.

FACTS:

Legislation was presented at the present session of the Legislature intending to require public school education for physically handicapped or exceptional children. (L.D. No. 896: AN ACT to Require Public School Education of Handicapped Children). The reference legislation has been withdrawn.

You request legal advice defining the extent of your authority under present statutes respecting educational opportunities for physically handicapped or exceptional children. Your memo quotes statutory language appearing in 20 M.R.S.A. §3111 and §3116 specifically involving such special education as well as language in 20 M.R.S.A. §101, 1 and 7 reciting certain of the general duties of the Commissioner of Education.

QUESTIONS:

1. What is the meaning of "within practical limits", recited in 20 M.R.S.A. § 3111?
2. Does the Commissioner of Education determine what are "practical limits"?
3. Can the Commissioner of Education absolutely require programs for special education for physically handicapped or exceptional children?

ANSWERS:

1. See REASON below.
2. No, the State Board of Education.
3. No.

REASON:

1. Research discloses no decisional law specifically defining the phrase "within practical limits". However, the heart of the clause is in the word "practical", and that term has been judicially defined as meaning that which is possible of reasonable performance. *Woody v. South Carolina Power Co.,* 202 S.C. 73, 24 S.E.2d 121. In *Joynes v. Pennsylvania R.R. Co.,* 234 Pa. 321, 83 Atl. 318, the word "practical" was defined as meaning feasible. The sentence containing the clause "within practical limits" reads as follows:

> "It is declared to be the policy of the State to provide, within practical limits, equal educational opportunities for all children in Maine able to benefit from an instructional program approved by the state board. * * *" *20 M.R.S.A. § 3111.*

The quoted sentence, as a statement of policy, should be interpreted to mean that the State of Maine intends to provide equal educational opportunities for all children in the State who are able to profit from instruction approved by the State Board of Education, provided the instructional program is feasible or reasonable as to its existence. Actually, definition of the phrase, "within practical limits", may be aided by reading the language of § 3117. The last noted section recites, inter alia, that: "In administrative units where there are *too few* handicapped or exceptional children to make the organization of a special class feasible, such children may be entered in a special class in another administrative unit". (Emphasis supplied.) Note the presence of the word "feasible". The words, "within practical limits", should be defined according to each individual set of circumstances. Whereas in one case, the facts may require an administrative unit to provide educational facilities and instructional program for physically handicapped or exceptional children, because the same is reasonable or feasible ("within practical limits"), an opposite result may well exist on a different set of facts. In 1964, this office was asked to express its opinion on the question whether an administrative unit was liable for payment to a receiving private school, located outside the administrative unit, for the local per capita cost of educating a number of physically handicapped and exceptional children residing in the administrative unit. We answered the question in the affirmative. *(1963–64 Report of the Attorney General, p. 129, February 5, 1964.)* That opinion states that administrative units are responsible for appropriating sufficient funds for the education of physically handicapped or exceptional children to the extent that instructional programs exist either in the administrative unit or in a public or private school of an adjacent administrative unit. Liability for tuition payments attached to the situation described in the opinion because the given facts fit the legislative declaration of "feasibility": and was, "within practical limits," capable of realization.

2. After reading applicable provisions of the Maine statutes relating to specialized public education, we conclude that the State Board of Education is the body authorized to administratively determine whether a particular set of facts are, "within practical limits", such that an administrative unit is obligated to provide educational programs of the nature involved here. The second paragraph of § 3111 authorizes each administrative unit to operate a program for trainable children as approved by the State Board of Education, under rules and regulations which the Board may prescribe. Section 3115 specifies that appropriated funds are to be paid administrative units or institutions according to regulations formulated by the State Board of Education "to permit adequate instruction and to prevent unnecessary use of state funds." The balance of the language of § 3115 confines the use of appropriated funds to specified purposes as well as "for any other purposes approved by the state board as being necessary to carry out the purpose of this chapter". True, § 3113 gives general supervision of the education of all children of school age in the State, including physically handicapped or exceptional children, to the Commissioner of Education; but we distinguish here between the exercise of general administrative supervision exercised by the Commission of Education, and the separate, independent authority of the State Board of Education when requiring an administrative unit to appropriate sufficient funds to provide for particular special instructional programs for physically handicapped or exceptional children. The decision that a given set of facts does or does not, "within practical limits", give rise to an obligation is of primary concern to the State Board of Education, whereas supervision of existing or ordered instructional programs is the function of the Commissioner.

3. Since the Commissioner of Education lacks authority to order performance by an administrative unit until the Board finds the facts are capable of performance "within practical limits", the Commissioner cannot absolutely require programs of special education for physically handicapped or exceptional children by administrative units absent such finding by the Board.

JOHN W. BENOIT, JR.
Deputy Attorney General

June 4, 1971
Maine State Police

Captain Emery H. McIntyre

Interpretation of Title 17 M.R.S.A. § 303

SYLLABUS:

Fair Associations must be in existence for two years before they can hold a license issued under 17 M.R.S.A. § 303.

FACTS:

A fair association which has been in existence for less than one year has applied for a Beano license under the provisions of 17 M.R.S.A. § 301, et. seq.

QUESTION:

May the Chief of the State Police issue a license to the fair association under the terms

of 17 M.R.S.A. § 303 when the fair association has not been in existence for two years.

OPINION:

No.

REASON FOR OPINION:

Resolution of this question depends upon interpretation of the provisions in section 303 of Title 17 which pertain directly and indirectly to whether a fair association must be in existence for a definite time period prior to licensure. The Legislature in passing § 303 listed several classes of licensees permitted to hold such a license. Those classes are set forth in the first sentence of that section. While the 2 year existence requirement at least refers directly to veterans organizations, the language of the first sentence is unclear as to whether fair associations are included in the class or classes which must exist for 2 years prior to licensure. However, the second sentence of § 303 stating one exception to the 2 year existence limitation reads:

> "Said 2 years' limitation shall not apply to any chartered posts of veterans organizations, nationally established even though such posts have not been in existence for 2 years prior to their application for a license; *and* provided that a license may be issued to a fair association to operate such amusement in conjunction with its annual fair when sponsored, operated and conducted for the benefit of such fair association." (Emphasis added)

Clearly, chartered posts of veterans organizations nationally established are not subject to the 2 year limitation. The use of the word *and* and then reference to (any) fair association sponsoring, operating and conducting Beano or Bingo at its annual fair merely spells out to the Chief of the State Police clear authority to issue a license for such an activity and does not remove the 2 year existence requirement.

Not specifically excepted, all classes of licensees with the exception of chartered posts of veterans organizations, nationally established, must exist for 2 years prior to licensure. Such classes are all mentioned in the first sentence of § 303 prior to language which expresses the 2 year existence requirement.

For these several reasons, the question posed is answered in the negative.

GARTH K. CHANDLER
Assistant Attorney General

June 14, 1971
Maine State Liquor Commission

Keith H. Ingraham, Chairman

Monthly Reports of Wholesalers

SYLLABUS:

Monthly sales reports to the Maine State Liquor Commission by Wholesalers of Malt Liquors and Wines are not "public record" within the meaning of 1 M.R.S.A. § 405.

FACTS:

The Maine State Liquor Commission receives a report each month from each Malt Liquor and Wine Wholesaler in the normal course of business which reflects the sales figures of that Wholesaler for the preceding month. The report is cross-checked in part with a report from each Brewer and is then filed. The report from each Brewer is then used in various operational activities, one being determining the Excise Tax owed to the State of Maine. However, the information on the report from the Brewers is identical in relevant part to that submitted to the Liquor Commission by the Malt Liquor and Wine Wholesalers.

QUESTIONS:

Is the information on the Reports received from the Wholesalers and the Brewers by the Liquor Commission a "public record" under the provisions of 1 M.R.S.A. § 401, et seq., such that other Wholesalers have access to the information?

OPINION:

No.

REASON:

The resolution of this question depends upon the intent of the Legislature with regard to the scope of that which is subject to public access under the provisions of 1 M.R.S.A. § 401, et. seq.

Section 405 of Title 1 permits, in addition to inspection of minutes of public proceedings, the inspection of "public records" including those minutes. Just what the Legislature intended to be considered "public record" in the case at hand must necessarily be resolved by the materiality of the records involved to the public proceedings of the Commission in its carrying out the function with which it is charged under Title 28. As the information which reflects the sales figures of the Wholesalers is not used in public proceedings which occur in the normal course of the Commission business, it is not open to public inspection under that section. As the use by the Commission is for administrative functions and not in "public proceedings" as defined by the statute, the information is not available to members of the public, including other Wholesalers, as a public record under § 401 et seq. of Title 1.

However, there being no other statutory language that such information is required to be kept confidential, the Commission may in its discretion withhold or make it available to individuals or groups as it sees fit.

GARTH K. CHANDLER
Assistant Attorney General

June 15, 1971
State

Joseph T. Edgar, Secretary of State

SYLLABUS:

The statutes requiring filing of proof of financial responsibility, do not apply to the uninsured owner of a motor vehicle involved in a reportable accident where, in the judgment of the Secretary of State, the liability of such owner for damages resulting from such accident is covered by a liability insurance policy insuring the operator of said vehicle.

FACTS:

Mrs. A owns an uninsured motor vehicle. Her son does not own a motor vehicle but does carry automobile liability insurance. With Mrs. A's full knowledge and consent, her son borrows her vehicle and becomes involved in an accident. Rather than handle the matter through the son's insurance company, Mr. A, the father, pays the damages sustained by the other party to the accident and obtains a complete release from any further liability.

QUESTION 1:

Under the provisions of 29 M.R.S.A. § 783, subsection 5, paragraph F, is it mandatory that the Secretary of State require Mrs. A to file proof of having obtained insurance and maintain that insurance for a period of 3 years, as provided by the Financial Responsibility Law?

ANSWER 1:

No, see reason.

QUESTION 2:

Does the language of the above-cited section prohibit the Secretary of State from requiring Mrs. A to obtain insurance and maintain it for the 3-year period?

ANSWER 2:

Yes, see reason.

QUESTION 3:

Is it optional with the Secretary of State to require or not require Mrs. A to comply with the Financial Responsibility Law in the matter of obtaining insurance?

ANSWER 3:

No, see reason.

REASON:

29 M.R.S.A. § 783, subsection 5, paragraph F, provides that the requirements of furnishing proof of financial responsibility under § 783, subsection 2, do not apply to the owner or operator of a motor vehicle involved in an accident if the owner had in effect an automobile liability policy with respect to the motor vehicle; nor to such operator, if not the owner, if there was in effect a liability policy with respect to his operation of motor vehicles not owned by him, nor to such operator or owner if the liability of such operator or owner for damages is, in the judgment of the Secretary of State, covered by any other form of liability insurance policy.

Although Mrs. A did not have a liability insurance policy in effect at the time of the accident, her son did have a policy which covered his operation of her vehicle. Had the son's insurance company been called upon, it would have been responsible for damages by reason of his negligence. Although a general release was obtained by Mrs. A's husband, rather than through the insurance company, the question of payment of any damages by her was resolved by the settlement, and the Secretary of State could determine that Mrs. A's liability would have been covered by the son's policy.

Such determination having been made by the Secretary of State, subsection 5, paragraph F, provides that the security and financial responsibility requirements of subsection 2 do not apply. Question 2 is, therefore, answered in the affirmative.

Question 3 must be answered in the negative. Having in effect determined that the provisions of section 2 do not apply to Mrs. A, the Secretary of State then has no option remaining, and may not require her to obtain and maintain insurance.

LEON V. WALKER, JR.
Assistant Attorney General

July 28, 1971
Retirement

E. L. Walter, Executive Secretary

Retirement benefits from both Retirement System and from the Judiciary Retirement Plan

SYLLABUS:

A Justice of the Superior Court may not receive retirement benefits from both the Retirement System and the Retirement Plan for the Judiciary.

FACTS:

A Justice of the Superior Court has applied for membership in the State Retirement System seeking to establish credit for his service as a legislator from 1947 to 1958 and as a member of the Executive Council from 1959 to 1960.

QUESTION:

Whether a Justice of the Superior Court may receive retirement benefits from both the Retirement System and the Judiciary Plan.

ANSWER:

No.

REASON:

The Legislature has provided that:

> "Any member who has served as a member of either the House of Representatives or the Senate, or as a member of the Executive Council of the State of Maine, shall be entitled to receive the appropriate creditable service for such legislative or Executive Council service." 5 M.R.S.A. § 1094 (3).

The Justice who has applied for membership based on his service in the legislature and on the Executive Council is applying for credit for service performed prior to the effective date of the above quoted legislation. The above statute refers to "Any *member* who . . . ". "Member", for purposes of the Retirement System, is defined as:

> "12. Member. 'Member' shall mean any *employee* included in the membership of the Retirement System, as provided in section 1091." 5 M.R.S.A. § 1001.

"Employee" is then defined as:

> "10. Employee. 'Employee' shall mean any regular classified or unclassified officer or employee in a department . . . but shall not include any Justice of the Superior Court . . . who is now or may be later entitled to retirement benefits under Title 4, section 5 . . . ". 5 M.R.S.A. § 1001.

The Justice in question could not be an employee because he is either "now or may be later entitled to retirement benefits under Title 4 . . . " Therefore, he is not now nor may he later become a "member" for the purposes of Section 1094, subsection 3 quoted above.

A Justice of the Superior Court may not participate in the State Retirement System while at the same time participating in the Retirement Plan, for Superior Court Justices.

CLAYTON N. HOWARD
Assistant Attorney General

August 6, 1971
Aeronautics

Linwood F. Wright, Director

Regulations of Augusta State Airport.

SYLLABUS:

The Director of Aeronautics may establish regulations for the Augusta State Airport governing aircraft traffic patterns, aircraft surface movement, aircraft parking and motor vehicle operation.

FACTS:

The Department of Aeronautics desires to establish certain rules and regulations for the Augusta State Airport. The rules and regulations would include, but not be limited to, those relating to aircraft traffic patterns, aircraft surface movement, aircraft parking

and motor vehicle operation, both on the airfield and off the airfield on airport property.

QUESTIONS:

1. Do the statutes relating to the Department of Aeronautics (Title 6 M.R.S.A. § § 1, et seq.) allow the promulgation of regulations for:
   A. aircraft traffic patterns;
   B. aircraft surface movement;
   C. aircraft parking; and
   D. motor vehicle operation,

at the Augusta State Airport, both on the airfield and off the airfield, on airport property.

2. How may the appropriate regulations be promulgated?

3. Are the Director of Aeronautics and the Inspector of Aeronautics authorized to enforce motor vehicle regulations on airport property, assuming they can be validly promulgated?

ANSWERS:

1. Yes.
2. See Opinion.
3. See Opinion.

REASONS:

The pertinent statutes are as follows:

> "The director shall administer the laws relating to aeronautics and shall make such rules and regulations concerning air traffic, not inconsistent with federal regulations covering aeronautics, as may be necessary to promote public safety and the best interests of aviation in the State.
>
> ******
>
> "The director shall supervise and control all state airports and shall make such rules and regulations concerning the use of the said airports and their facilities as he deems necessary for the efficient management thereof and the development of aviation . . . . " *Title 6 M.R.S.A. § 12.*

With respect to enforcement of statutes, rules and regulations, the statutes provide as follows:

> "Inspectors, when so designated by the director, shall have, in any part of the State, the same authority to enforce and to make arrests for the violation of any provision of chapters 1 to 13 or any rule and regulation promulgated thereunder as sheriffs, policemen and constables have in their respective jurisdictions." *Title 6 M.R.S.A. § 201.*

1. *May rules and regulations be promulgated for the Augusta State Airport covering aircraft traffic patterns, aircraft surface movement, aircraft parking and motor vehicle operation both on the airfield and off the airfield on airport property?*

The statutes provide that the Director shall make rules and regulations concerning "air traffic" (apparently at any airport) and the use of "airports" and their "facilities" (at State airports). (*Title 6 M.R.S.A. § 12*) The question is whether the language of the statute is broad enough to include the reference regulations.

"Traffic" has been defined as:

" . . . the passing to and fro of persons, animals, vehicles or vessels along a route of transportation, as along a street . . . . " *Black's Law Dictionary, 4th Ed.*

"Airport" is defined in the statute as follows:

"Airport means any area of land or water which is used, or intended for use, for the landing and take-off of aircraft, any appurtenant areas which are used or intended for use, for airport buildings, other airport facilities, rights of way, together with all airport buildings, wharfs and facilities thereon." *6 M.R.S.A. § 3, sub-§ 8.*

"Facilities" is not defined in the statute, but generally, "facilities" are defined as:

"That which promotes the ease of any action, operation, transaction or course of conduct." See *Black's Law Dictionary, 4th Ed.*

The word has been applied to land reasonably necessary for the operation of a railroad and accommodation of patrons. *16 Words and Phrases "Facilities"* citing *Munoz v. Porto Rico Railway Light and Power Company, CCA Puerto Rico,* 74 F.2d 816, 821. It has been applied to barracks for Air Force personnel at an airport. *3 Words and Phrases "Airport Facilities"* citing *National Aircraft Maintenance Corp. v. U.S.,* 171 F. Supp. 946, 949.

The statute clearly would allow the promulgation of regulations governing "air traffic" patterns. Too, the meaning of air traffic is broad enough to include aircraft surface movement and aircraft parking. In any event, the remaining language of the statute referring to "airports" and "facilities" appears to encompass those areas of regulation including motor vehicle operation. The sense of the statute indicates that the Director is to "supervise" and "control" airports and their facilities. We read this to refer to all necessary incidents to the operation of airports. This conclusion is reinforced by a statement of purpose of the aeronautics laws as being for ". . . the protection and promotion of the public interest and safety in connection with the operation of aircraft". (*Title 6 M.R.S.A. § 2, sub-§ 4.* See also *Title 6 M.R.S.A. § 2, sub-§ 3.)* It is important to the safety of the public and to the operation of aircraft to control the operation of motor vehicles on airport property.

We interpret the noted provisions of reference § 12 as giving the Director of Aeronautics authority to promulgate rules and regulations concerning aircraft traffic patterns, aircraft surface movement, aircraft parking and motor vehicle operation on airport property. Although the question is not posed, we advise that "motor vehicle operation" would include parking.

It should be noted that any regulation concerning air traffic promulgated under the first-above-cited portion of § 12 must not be inconsistent with federal regulations covering aeronautics and must be "necessary to promote public safety and the best interests of aviation in the State". (See *Title 6 M.R.S.A. § 12*) Too, any regulations promulgated under the second above-cited portion of § 12 must, in the judgment of the Director, be necessary for the efficient management of airports and the development of aviation. (See *Title 6 M.R.S.A. § 12, 3rd paragraph*)

2. *How may the appropriate regulations be promulgated?*

There is no specific method provided in the statute for promulgating regulations. We would recommend generally following, insofar as possible, the guidelines in the statutes of Maine relating to the administrative code. (See *Title 5 M.R.S.A. Ch. 303*) Generally speaking, the code contemplates that prior to the adoption, amendment or repeal of a rule or regulation an agency shall so far as practicable publish or otherwise circulate notice of its intended action and afford interested persons opportunities to submit suggestions concerning the action. It also contemplates that prior to the adoption,

amendment or repeal of any rule or regulation that the agency is to submit the proposal to the Attorney General for approval as to form and legality. Thereafter, regulations are filed with the Secretary of State in the form prescribed by Title 5 M.R.S.A. § 2352.

We stress that the following of these provisions is not mandatory here. We suggest that these provisions would furnish a guideline for the necessary formality in promulgating the regulations. Of course, any regulations promulgated should be dated and signed by the Director and we would recommend that they be submitted to this office for approval as to form and legality in order to avoid any unnecessary enforcement difficulties.

3. *Who is authorized to enforce any motor vehicle regulations promulgated?*

With respect to enforcement of regulations promulgated by the Director, inspectors, when so designated by the Director, may have the authority to enforce rules and regulations. It appears that the Director does not have that enforcement authority. *Title 6 M.R.S.A. § 201.* (See also P.L. 1969, c. 590, § 7 repealing previous authority of Director.)

We note also chapter 404 of the Public Laws of 1971, which is not yet effective, provides in section 14 thereof that the Director shall have, in any part of the State, the same authority to enforce and make arrests for violation of any provision of chapters 1 to 15 or any rule or regulation promulgated thereunder as sheriffs, policemen and constables have in their respective jurisdictions. We add this as a caveat to our statement that the Director does not presently have that authority. This provision will become effective on September 23, 1971.

We have also examined Ch. 404 of the Public Laws of 1971 relating to changes in the aeronautics laws, which will become effective September 23, 1971, and with the exception of the above parenthetical comment, do not believe that any changes therein would work a change in the results herein reached.

JON R. DOYLE
Deputy Attorney General

August 11, 1971
Environmental Improvement Comm.

William R. Adams, Director

Use of proceeds from certain bond issues

SYLLABUS:

The proceeds of the bond issues authorized by Me. Priv. & Spec. Laws 1965, c. 235 and Me. Priv. & Spec. Laws 1969, c. 181 may not be used to finance the development of guidelines for administering Me. Public Laws 1971, c. 535.

FACTS:

Me. Public Laws 1971, c. 535, directs Environmental Improvement Commission, in concert with the Maine Land Use Regulation Commission, and after consultation with the State Planning Office, to adopt suitable zoning ordinances for the shoreland areas of those municipalities which, by June 30, 1973 have either failed to adopt such ordinances or have adopted ordinances which, in the judgment of the two Commissions, are lax and permissive.

QUESTION:

May the proceeds of the bond issues authorized by Me. Priv. & Spec. Laws 1965, c. 235 and Me. Priv. & Spec. Laws 1969, c. 181 be used to finance development of the criteria necessary to properly administer Me. Public Laws 1971, c. 535?

ANSWER:

No.

OPINION:

The 1965 bond issue, by its terms, is to raise funds " . . . to provide for the construction and equipment of pollution abatement facilities authorized under the Revised Statutes of 1954, chapter 79, section 7-A, and Acts amendatory thereof." Me. Priv. & Spec. Laws 1965, c. 235, § 1. The development of criteria to administer a law enacted in 1971 does not come within these cited purposes.

The 1969 bond issue, by its terms, is to raise funds " . . . to provide for the planning, construction and equipment of pollution abatement facilities authorized under the Revised Statutes and Acts amendatory thereof." In our opinion, the purpose for which you contemplate using the proceeds of this bond issue is not within the purposes envisioned by the Legislature. We cannot say that your contemplated purpose is planning, construction or equipment of a pollution abatement facility authorized by the Revised Statutes. In the context of the 1967 act, we construe the word "facilities" to include only inanimate items capable of being used in the reduction, treatment and disposal of waste, including, by the way of illustration and not by way of limitation, sewage treatment plants, industrial-municipal waste treatment plants, incinerators and cone burners.

ROBERT G. FULLER, JR.
Assistant Attorney General

August 18, 1971
Liquor Commission

Keith Ingraham, Chairman

P.L. 1971, Ch. 268, An Act Relating to Sale Price of Liquor

SYLLABUS:

Liquor licensees are entitled to a discount at the state store wherein prices have been reduced under the authority of Title 28 M.R.S.A., § 451, as amended.

FACTS:

The 105th Legislature enacted Ch. 268 of the Public Laws of 1971. It provides, by way of amendment to Title 28 M.R.S.A. § 451, that the Liquor Commission, with approval of the Commissioner of Finance and Administration, may reduce the price of liquor in one store. Similarly, there may be established at that store the price to which the licensee discount in Title 28 M.R.S.A. § 204 is to be applicable.

However, Section 204, also amended, contains a provision relating to licensee discount which appears to conflict with the provision in Section 451. The Liquor Commission indicates its belief that it was the intention of the Legislature that no licensee discount be applicable at the one store.

QUESTIONS:

1. Is the licensee discount applicable to purchases at the store which has reduced liquor prices under the authority of Title 28 M.R.S.A. § 451?
2. If the discount is applicable, is it to be applicable to:
   A. The regular retail price established at the one store for consumers (T. 28 M.R.S.A. § 204);
   B. A special "retail price" established at the store for the purpose of applying the 10% discount (T. 28 M.R.S.A. § 451)?

ANSWERS:

1. Yes.
2. The licensee discount is applicable to a price established for that purpose under Title 28 M.R.S.A. § 451.

REASON:

The applicable provisions are as follows:

"The commission shall sell to such licensees spirituous and vinous liquor, except table wine, for a price of 10% less than the retail price established for the state retail store where the purchase is made provided that such discount shall not apply to federal taxes levied on and after November 1, 1941." P.L. 1971, ch. 268, § 1.

"Notwithstanding the other provisions of this section, the commission, with the approval of the Commissioner of Finance and Administration, may reduce the price of liquor in one store and establish at that store the price to which the 10% discount in section 204 shall be applicable." P.L. 1971, ch. 268, § 2.

Since the above two provisions appear to be in conflict, it is necessary to resort to legislative intent in order to construe them. Legislative intent controls the construction of statutes. *Beckett v. Roderick* (Me. 1969), 251 A.2d 427.

It is the rule that in construing statutes the courts must ascertain and carry out legislative intent. The courts will consider legislative intent, the object it had in view, and the mischief it intended to remedy. The intention of the Legislature in enacting a statute must be sought from all its facts. See *Hanbro, Inc. v. Johnson,* 181 A.2d 249, 158 Me. 180. See also *Camp Walden v. Johnson,* 163 A.2d 356, 156 Me. 160. The legislative history of the provisions may properly be examined into. *Austin v. State,* 202 A.2d 794, 160 Me. 240, cert. den. 86 S.Ct. 636, 382 U.S. 1018, 15 L.Ed.2d 533.

Recitals of legislative intent, although not conclusive on the judicial branch, are entitled to consideration. *Toothaker v. Me. Employment Security Commission* (Me. 1966), 217 A.2d 203.

Statutory construction which leads to a result clearly not within the contemplation of the Legislature or which leads to a result which is absurd should be avoided, even though the strict letter of the law may have to be disregarded. See *Ballard v. Edgar* (Me. 1970), 268 A.2d 884 and *State v. Taplin* (Me. 1968), 247 A.2d 919. See also *Reggep v.*

Lunder Shoe Products Company (Me. 1968) 241 A.2d 802.

The legislation was introduced in the Legislature in the form of L.D. 1181 which provided that the Commission, with the approval of the Commissioner of Finance and Administration, might reduce the price of liquor in *any* of its stores so long as the price was not reduced to an amount which would produce an effective state liquor tax of less than 40%. As originally drafted, the bill also provided the Commission could sell to licensees spirituous and vinous liquor, except table wine, for a price of 10% less than the retail price *established for the store where the purchase is made.*

There were two amendments which were offered to the legislation (H-108 and H-166). The first amendment (H-108) provided that the Commission could reduce the price in only one store in the State of Maine.

The second amendment (H-166) provided the Commission could, at the one store, establish at that store the price to which the 10% discount in section 204 was to be applicable.

The Statement of Fact on the second amendment indicates its purpose:

> "*The purpose of this amendment would allow the State Liquor Commission to* utilize its discretion in reducing prices in order to effectively meet competition with liquor stores in other jurisdictions located around the borders of the State of Maine and *establish at that store, a price to which the discount of 10% in section 204 of Title 28 shall apply.*" (Emphasis supplied.)

Both amendments were subsequently adopted and L.D. 1181, as amended, became P.L. 1971, c. 268 quoted supra.

The question posed by the Liquor Commission involves an analysis of whether or not the amendment was effective to accomplish its stated purpose of the establishment of a special price to which the 10% discount in section 204 of Title 28 is to be applicable.

Section 204, as amended, indicates in clear terms that the Commission shall sell to certain licensees spirituous and vinous liquor, except table wine, for a price of 10% less than the retail price established for the store where the purchase is made.

Clearly, under either section 204 or 451 a discount is applicable to purchases by licensees.

The question is if the Commission reduces the price of liquor in one store, is a discount applicable to that reduced retail price or may a special retail price, for the purpose of applying a discount to that price, be established by the Commission.

It is our view that the legislative intention was clear. The Legislature desired to allow the Commission to reduce the retail liquor prices in one store and additionally to establish at that store a special "retail price" to which the 10% discount in section 204 of Title 28 shall be applicable. The amendment could have been drafted more artfully or more clearly.

The legislative intention was to provide for reduced prices for the *consumer* in order to meet competition from stores in other jurisdictions. Too, the Legislature by referring to licensee discount in the amendment to § 451 was clearly concerned that the amendment not put certain licensees at a competitive advantage. The amendment was designed to give the Commission the necessary flexibility to meet the problem.

To read the amendment differently from the result reached herein would be to render the phrase "establish at that store the price to which the 10% discount in section 204 shall be applicable" meaningless. We therefore advise, assuming action to reduce the prices in one store is properly taken under the provisions of section 451, as amended, that licensees may receive a discount at that store, which discount is to be applicable to a price established by the Commission with the approval of the Commissioner of Finance and Administration.

The price established for licensee purchases may, for example, be the same as or more than the retail price established for other than licensee purchases. Under the language of the amendment, it could be the same retail price as that established in all other retail stores. It could not be more. In short, the Legislature has left the matter of licensee discount pricing at one store up to the Commission, and the Commissioner of Finance and Administration, within established guidelines. Too, although the provision "may . . . establish . . . " can be read to reach an opposite result, we believe that once reduced prices are established at one store, a price must likewise be established to which the licensee discount is applicable.

JON R. DOYLE
Deputy Attorney General

August 9, 1971
Bureau of Taxation

To: Ernest H. Johnson, State Tax Assessor

Subject: The Gross Direct Premium Tax As Applied To A Special Contractual Insurance Arrangement

SYLLABUS:

THE ENTIRE SUM RECEIVED ANNUALLY BY A DOMESTIC INSURANCE COMPANY, IS A GROSS DIRECT PREMIUM AND IS TAXABLE AS SUCH, LESS RETURN PREMIUMS AND DIVIDENDS, UNDER THE PROVISIONS OF 36 M.R.S.A. §2511 WHEN THE SUM IS RECEIVED PURSUANT TO A SPECIAL CONTRACTUAL ARRANGEMENT WHEREBY A PORTION OF THE SUM RECEIVED IS COMPENSATION TO THE INSURANCE COMPANY FOR HANDLING OF THE INSURED CORPORATION'S LOSS CLAIMS AND THE BALANCE OF THE SUM RECEIVED IS PLACED IN A SPECIAL "LOSS FUND ACCOUNT" IN A BANK OR TRUST COMPANY FROM WHICH ACCOUNT THE INSURANCE COMPANY PAYS THE INSURED CORPORATION'S COVERED LOSSES.

FACTS:

There is proposed to be organized in the State of Maine an insurance company, which plans to enter into contracts with a number of large corporations. Pursuant to these contracts a corporation would turn over to the insurance company annually a substantial sum of money for payment of indemnity claims against the corporation and for compensation to the insurance company for the processing of the claims. The sums of money turned over to the insurance company would pursuant to a Loss Fund Agreement less the agreed upon compensation be turned over immediately by the insurance company to a bank or trust company and placed in a special trust account in the bank or trust company hereinafter referred to as the Loss Fund. From the Loss Fund claims against the insured corporation would be paid by the insurance company. The Loss Fund Agreement would provide inter alia, that the insurance company would have no right, claim or interest in the principal or income of the Loss Fund. Also, payments would be made out of the Loss Fund only to or for the account of the insured; no portion of the principal or income of the Fund would be paid to the insurance company for its own account.

In addition it has been submitted that the amount paid in annually by the insured corporation is deductible by the insured corporation as an insurance premium expense for federal income tax purposes. All interest from the Loss Fund belongs to the insured corporation and it is also intended that the bank would provide a line of credit to the insured corporation for the difference between the commencement amount of the Loss Fund and the agreed total amount of the Loss Fund. (For supporting and additional information, see attached material.) It is also understood that all such insurance contracts between the insurance company and an insured corporation will be delivered by the insurance company to the insured corporation in the State of Maine. The State of Maine Insurance Department has concluded that the proposed contracts are insurance contracts and would be subject to regulation by that department.

QUESTION:

Should the sum paid by the insured corporation, or only the percentage of that sum to which the insurance company is entitled as compensation for its activities, be considered as a taxable premium within the scope of 36 M.R.S.A. § 2511 through 2552?

ANSWER:

Both the sum deposited in the Loss Fund and the percentage of that sum to which the insurance company is entitled as compensation for its activities are taxable as gross direct premium.

REASONS:

The Maine Insurance Code defines insurance as follows:

> " 'Insurance' is a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, or to pay or grant a specified amount or determinable benefit or annuity in connection with ascertainable risk contingencies, or to act as surety." 24-A M.R.S.A. § 3

This opinion is based on the conclusion of the insurance department that the proposed contracts are insurance and fall within the statutory definition of insurance. It should be noted that the proposed contract differs inter alia from most insurance contracts in that under the proposed contract all losses to an insured will be paid entirely from sums furnished by that insured. Typically with insurance contracts there is a spreading of the risk so that losses are paid from premiums provided in part by other insureds.

Title 24-A of the Maine Revised Statutes in the Maine Insurance Code. Chapter 27 of Title 24-A is a chapter whose scope is set forth in § 2401. This section reads as follows:

> "This chapter applies as to all insurance contracts and annuity contracts, other than:
>
> 1. Reinsurance.
>
> 2. Policies or contracts not issued for delivery in this State nor delivered in this State.
>
> 3. Wet marine and transportation insurance." 24-A M.R.S.A. § 2401

Chapter 27 applies to the proposed insurance contracts as they are not contracts of reinsurance, they are contracts to be delivered in the State and are not, on the basis of the facts provided, wet marine and transportation insurance.

2403 of Chapter 27 of Title 24-A defines premium as follows:

" 'Premium' is the consideration for insurance, by whatever name called. Any 'assessment', or any 'membership', 'policy', 'survey', 'inspection', 'service' or similar fee or other charge in consideration for an insurance contract is deemed part of the premium."

The compensation to the insurance company provided by the insurance contract, which is compensation deducted from the sum turned over to the insurance company by the insured corporation prior to the deposit of the balance of that sum in the Loss Fund in the bank or trust company, clearly is a fee contemplated by the second sentence of 24-A M.R.S.A. § 2403. This being so, can this compensation be the entire premium? We conclude it cannot. As the statute specifically says that such a fee is "deemed part of the premium" a part cannot be considered the entire premium. The premium is the consideration for insurance by whatever name called.

The pertinent taxing provision is 36 M.R.S.A. § 2511. The first sentence of this section relates to the taxation of domestic life insurance companies or associations. The second sentence of 36 M.R.S.A. § 2511 relates to the premium tax upon other domestic insurance companies or associations. The proposed insurance company would be subject to the tax imposed in the second sentence. The second sentence reads as follows:

"Every other insurance company or associations organized under the laws of this State, except those mentioned in section 2517, including surety companies and companies engaged in the business of credit insurance or title insurance shall annually pay a tax of 1% upon all *gross direct premiums* written whether in cash or in notes absolutely payable on contracts made in the State for fire, casualty and other risks, less return premiums thereon and less all dividends paid to policyholders and less all premiums and assessments on policies of insurance issued on farm property."

The tax is based on the gross direct premiums less return premiums and dividends paid to policyholders. The word "direct" is used to signify the situation of premium paid by an insured to an insurer as distinguished from a reinsurance situation whereby one insurer assumes part of the risk of another insurer in consideration for a premium paid by the first insurer to the reinsurer. This latter premium is not a direct premium.

In discussing the distinction between "net premium" and "gross premium" a leading treatise on insurance states:

"The part of the premium intended to meet the cost of insurance, both current and future, and carry it from period to period, is called the 'net premium'; it is the sum paid periodically by each to furnish the stipulated protection for all. In addition to this amount, the policyholders also pay what is known as a 'loading' rate, which is a sum added to the net premiums for administration, management, and operating expenses, as well as for emergency purposes, and, in some cases, profits. And this sum, added to the 'net premium', creates what is known as the 'gross premium.' " Vol. 5 *Couch on Insurance* 2d p. 506

While it is true that the above discussion is based on life insurance cases wherein the sum paid by each insured may be used to pay the beneficiaries of another insured as distinguished from a fact situation whereby the sum paid by each insured is segregated in a special fund and used to cover losses of that insured alone and no other insured, the underlying analysis of what constitutes a gross premium is valid.

The money placed by the insurance company pursuant to the Loss Fund Agreement in a Loss Fund in a bank or trust company is the part of the premium intended to cover the risk of the covered losses, and when and if pursuant to the Loss Fund Agreement, the insured corporation receives a portion of the funds deposited in the Loss Fund the receipt by the insured corporation is a return of premium for which the proper

adjustment in the taxable base must be made.

In further support of the conclusion that the entire sum paid by the insured corporation to the insurance company is a gross direct premium, we understand that the corporate insureds are to be advised that the entire sum paid in annually by them to the insurance company is deductible as an insurance premium expense for federal income tax purposes which enables them to build funds on a pre-tax basis and when any of the funds on deposit in the Loss Fund are returned to the corporate insured the returned funds will be treated as taxable income.

In addition reference is made to the July 28, 1971 letter of Keith Brown, Esquire of LeBoeuf, Lamb, Leiby & MacRae (see attached material), when in writing about the proposed insurance company at the suggestion of Mr. Michael Clement, Vice President of North Star Reinsurance Corporation, he states in pertinent part:

> "All *premiums* received by that company less 5% will immediately be paid over to a provisional bank or trust company and held by it for the benefit of the insured making any premium payment pursuant to a Loss Fund Agreement." (Emphasis supplied)

Certainly such language is consistent with the position that the sums received by the insurance company from an insured corporation would be deductible as a premium expense, we also believe such language to be consistent with the conclusion that such premiums are gross premiums and are taxable at the rate of 1% after the necessary adjustment for return of premiums.

JEROME S. MATUS

August 19, 1971
E.I.C.

William R. Adams, Director

Questions concerning Me. Public Laws 1971, c. 535

SYLLABUS:

The mandatory shoreland areas zoning requirements of Me. Public Laws 1971, c. 535, apply within 250 feet of the normal high water mark of all navigable flowing bodies of water in the State.

Whether a body of water is "navigable" is a question of fact for administrative determination in the first instance.

FACTS:

By memo you have asked the following questions regarding interpretation of Me. Public Laws 1971, c. 535.

QUESTION NO. 1:

The subject law defines the term "shoreland areas" as "those land areas any part of which are within 250 feet of the normal high water mark of any navigable pond, lake, river or salt water body . . . " can the word "river" be construed to include brooks and streams?

ANSWER NO. 1:

Yes, if such flowing bodies of water are navigable.

OPINION NO. 1:

The word "river" as used in the subject law should, in our view, be read in conjunction with the term "navigable" which modifies it. Read together, these words evince a legislative intent that the subject law apply to flowing bodies of water which are navigable.

QUESTION NO. 2:

What constitutes a "navigable" body of water for purposes of the subject law?

ANSWER NO. 2:

See opinion.

OPINION NO. 2:

Whether a body of water is navigable is a question of fact for administrative determination, and not a question of law. *See Flood v. Earle,* 145 Me. 24, 71 A.2d 55 (1950). Maine case law indicates that the capability of use for transportation is the criterion of whether or not a stream is navigable. *Smart v. Aroostook Lumber Co.* 103 Me. 37, 68 Atl. 527 (1907). All bodies of water which in their natural condition are capable of floating boats, rafts and logs are under Maine law "navigable". *Ibid.; see also Wilson & Son v. Harrisburg,* 107 Me. 207, 77 Atl. 787 (1910). Some specific waters have had their navigability adjudicated, *e.g., State v. Plant,* 130 Me. 261, 155 Atl. 35 (1931) (Kennebec River); *Smart v. Aroostook Lumber Co., supra* (Presque Isle stream); *Veazie v. Moor,* 55 U.S. 568 (1852) (Penobscot River).

QUESTION NO. 3:

The subject law uses the term "municipal units of government". What is the meaning of this term?

ANSWER NO. 3:

The term "municipal units of government" should be considered to have the same meaning as the term "municipality" as defined in 1 M.R.S.A. § 72, sub-§13.

QUESTION NO. 4:

The subject law empowers the commission, in conjunction with another State agency, to adopt a shoreland zoning ordinance for any municipality who fails to do so by June 1, 1973, or for any municipality whose shoreland zoning ordinance is, in the judgment of these agencies, lax and permissive. You inquire how the Commission is to determine whether local ordinances are adequate.

ANSWER NO. 4:

Not answered.

OPINION NO. 4:

The subject law places the burden of determining adequacy of local shoreland zoning ordinances upon the two named state agencies. Accordingly, these agencies must internally develop their own methods for determining such adequacy. After such methods have been developed, we will be pleased to review them if you wish.

QUESTION NO. 5:

Is the question of laxity and permissiveness of a local shoreland areas zoning ordinances to be judged by reference to the letter of the ordinance alone, or may the commission consider the record of the municipality's administration and enforcement of the ordinance as well?

ANSWER NO. 5:

Not answered.

OPINION NO. 5:

We again direct your attention to the fact that the subject law leaves the determination of adequacy of local shoreland zoning ordinances upon the named state agencies. The agencies must develop their own criteria for determining adequacy. The municipality's record of administration and enforcement of the ordinance may well be a factor which the Commission might wish to consider in making its determination.

ROBERT G. FULLER, JR.
Assistant Attorney General

August 18, 1971
Bureau of Public Improvements

Richard Batchelder, Supervising Engineer

Construction of Swimming Pool at the Pineland Hospital and Training Center

SYLLABUS:

Absent Special Legislation, the construction of the swimming pool at the Pineland Hospital and Training Center is entirely a State matter controlled by Title 5, M.R.S.A. 1964, Chapter 153; the funds appropriated by the Legislature can not be turned over to the control of any individual or group for the private contracting of pool construction. There is no authority for restricting bidders to contractors having all union employees; the Governor and Council can not accept a gift of funds for construction of the Pineland pool subject to such condition.

FACTS:

By Chapter 30 of the Resolves of 1971 the 105th Legislature appropriated funds in the following language:

"That there is appropriated to the Pineland Hospital and Training Center, Department of Mental Health and Corrections, from the Unappropriated Surplus of the General Fund the sum of $50,000 to aid in the construction of a swimming pool."

A Committee comprised of members of a Labor Union, the American Federation of State County and Municipal Employees, AFL-CIO, has been involved in the project of raising funds for the construction of a swimming pool at the Pineland Hospital and Training Center. Several questions have been raised in connection with the appropriate disposition of the appropriation and the assistance of this office has been sought in the resolution of such questions.

QUESTION:

1. Can the State accept a gift of the money raised by a committee with the condition that any contract to be put out be only with a so-called union contractor?
2. Can the $50,000 appropriation be given to the committee raising the funds who will contract for the building of the swimming pool?
3. Can the State use the $50,000 to buy certain integral units of the swimming pool as an allowance on a contract to be put out by the committee raising the funds?

ANSWER:

1. No.
2. No.
3. No.

REASON:

1. Title 5 M.R.S.A. 1964, § 1743, as amended, provides as follows:

"Any contract for any public improvement involving a total cost of more than $10,000, except contracts for professional, architectural and engineering services, shall be awarded by a system of competitive bidding in accordance with chapters 141 to 155 and such other conditions and restrictions as the Governor and Council may from time to time prescribe. Contracts in the amount of $10,000 or less shall be awarded by a system of competitive bidding. Such contracts shall be awarded by the appropriate department or agency with the prior authorization of the Bureau of Public Improvements.

"No agency of the State shall enter into any contract for a public improvement, nor shall any of its instrumentalities enter into any contract for buildings or public works, with a general contractor unless the contract shall provide that the prime contractor shall not subcontract more than 80% of the total bid price."

We find in the above quoted language a legislative mandate that in connection with public improvements costing in excess of $10,000, contracts shall be awarded pursuant to a system of competitive bidding. We have examined Chapters 141 through 155 of Title 5 and find no legislatively authorized exceptions to the competitive bidding

procedure, which would permit the restriction that the only bidders for the contract to construct the Pineland swimming pool be contractors with all union employees.

We find that the Legislature has made provision for the exclusion of certain bidders based on qualifications and financial responsibility grounds in Title 5 M.R.S.A. 1964, §§ 1747, 1748. Under the statutes relating to the Bureau of Purchases we find provision for preferential treatment of Maine bidders in certain instances in Title 5 M.R.S.A. 1964, § 1816, subsec. 8, and under subsec. 2 of that section provision is made for certain waivers in connection with purchases of services and goods. We find no other legislatively authorized conditions or restrictions in connection with the bidding procedure. We construe the legislative mandate that construction contracts, involving in excess of $10,000, be pursuant to competitive bids without applicable statutory exceptions, to preclude restricting bidders to those having all union employees.

We find no authority vested in the Governor and Council to restrict competitive bidding by permitting only contractors with all union employees to bid. The Legislature has provided for mandatory competitive bidding in accordance with Title 5 M.R.S.A. 1964, Chapters 141 through 155, and has authorized the Governor and Council to prescribe other conditions and restrictions, from time to time, in connection with construction contracts. We take the language of Title 5 M.R.S.A. § 1743 to mean that the Legislature has spoken in Chapters 141-155, in connection with competitive bidding and that it has vested the Governor and Council with authority to prescribe conditions and restrictions only as to contractual matters other than competitive bidding. It, therefore, follows that the Governor and Council could not accept a gift of funds intended for expenditure in the construction of the swimming pool at Pineland subject to a condition that bidding would be restricted to contractors having only union employees.

2. The Legislature, by Resolves, Chapter 30, has appropriated $50,000 to Pineland Hospital and Training Center to aid in the construction of a swimming pool. The Legislature has not authorized Pineland to give such funds to any private individual or group. The Legislature knew from the Statement of Facts, annexed to L.D. 538, that the proposed cost of the swimming pool construction would exceed $200,000, and in contemplation of this fact in their appropriation provided that the sum of $50,000 was to *aid* in construction, upon the assumed understanding that other funds would be forthcoming from other sources. The Legislature could have provided for the turning over of the sum appropriated to a private individual or group and thus, by Special Legislation, could have permitted the construction of the swimming pool in a manner other than that provided for in the General Law; the Legislature made no such provision. We, therefore, look to the General Law and find that construction of public improvements is controlled by Title 5 M.R.S.A. 1964, Chapter 153, from the bidding procedure to the final acceptance of the construction project; the provisions of that Chapter apply. The Bureau of Public Improvements is vested with supervisory authority over all such construction. Absent pertinent Special Legislation we find no basis for placing the $50,000 sum, in question, in the control of any private individual or group, and outside the control of the General Law and statutory framework relating to the construction of public improvement.

3. Since we have responded to Question 2 by expressing the opinion that the construction of the Pineland pool is entirely a State matter we need not expand upon the reason for our negative response to Question 3. It suffices to say that Question 3 is answered in the negative for reasons set forth above.

In summary, absent Special Legislation, the construction of the swimming pool at the Pineland Hospital and Training Center is entirely a State matter controlled by Title 5

M.R.S.A. 1964, Chapter 153; the funds appropriated by the Legislature can not be turned over to the control of any individual or group for the private contracting of pool construction. There is no authority for restricting bidders to contractors having all union employees; the Governor and Council cannot accept a gift of funds for construction of the Pineland pool subject to such condition.

COURTLAND D. PERRY
Assistant Attorney General

September 1, 1971
Agriculture

Maynard C. Dolloff, Commissioner

P.L. 1971, c. 366; Meaning of "Guarantees" Appearing in Section 1022, sub-§ 2.

SYLLABUS:

The language respecting "guarantees" in P.L. 1971, c. 366 (7 M.R.S.A. § 1022, 2) does not bar a Maine potato grower from guaranteeing his product to point of destination.

FACTS:

The Legislature, at the 1971 Regular Session, enacted licensing provisions regarding the potato industry. *P.L. 1971, c. 366.* The reference legislation contains the following language respecting "guarantees":

> "In any sale in which the buyer of such potatoes is a person required to be licensed by this Article and has a place of business in this State except a retailer, any guarantees with regard to grade, size, weight or other specifications, made by the producer shall be deemed satisfied when the grade, size, weight or specifications, as certified by a licensed federal-state potato inspector, or seed potato inspector, after such potatoes have been or while they are being loaded for transit, equals or exceeds the grade, size, weight or other specifications of such potatoes stated in such record. Any producer making such guarantees shall at all time prior to shipment have the option to determine whether or not said potatoes shall be inspected in accordance with this subsection. Any agreement conflicting with the provisions of this subsection is not enforceable by way of action or defense." *(Section 1022, 2 of Title 7)*

It is represented that many potato growers will want to guarantee their product to destination and that many dealers will accept this type of business. For various reasons, a grower may become disgruntled because either his neighbor or some other grower is making such guarantees beyond the Maine shipping point. Such a disgruntled grower may complain to the Commissioner of Agriculture in the form of a verified complaint presented under § 1016 of the reference licensing statute. Because the filing of such a verified complaint calls for an investigation by you as Commissioner (or your duly authorized agent) and the attending possibility of subsequent revocation of license, you have been asked to express your opinion whether an agreement between a grower and a dealer wherein the former guarantees the product to destination outside Maine would be viewed as a violation of the guarantee provision cited above.

QUESTION:

Whether a grower's guarantee of his product as to grade, size, weight or other specifications, to destination violates the "guarantees provision" in the reference licensing statute?

ANSWER:

No.

REASONS:

The "guarantee language" does not pointedly state that a potato grower may not legally guarantee his product to destination as to grade, size, weight or other specifications. The language in the first sentence considered to be material to the issue is that language wherein any guarantees made by the producer are deemed "satisfied" when a licensed federal-state potato inspector or seed potato inspector certifies that the product equals or exceeds that stated in the record as to grade, size, weight or other specifications. The material word in that sentence is "satisfied". The decisional law respecting the definition of the word "satisfied" is not helpful in determining the meaning of the word as used here. *Words and Phrases, "Satisfied".* The word "satisfied" can mean any one of several things: (1) To answer or discharge, as a claim, debt, legal demand, or the like; (2) To convince or free from uncertainty; (3) To answer convincingly, as to solve; or (4) To fulfill the requirements of, as to satisfy a condition. It appears that the term, "satisfied", as used in the reference "guarantees" means to fulfill the requirements of something, i.e., to satisfy a condition. *Webster's New Collegiate Dictionary, "Satisfy".* That interpretation seems reasonable in light of the fact that the grade, size, weight or other specifications of the product involve the condition of the product.

Continuing, the next question is whether language appears in the reference guarantee provision restricting the operation of the guarantee to the shipping point in Maine. The only restrictive language appears in the last sentence: "Any agreement conflicting with the provisions of this subsection is not enforceable by way of action or defense." However, that sentence is dependent upon what appears in the balance of the paragraph. We find nothing in the remainder of the paragraph which in any way forecloses a grower from guaranteeing his product to destination respecting its grade, size, weight or other specifications. It even appears that the reference guarantees may be created with or without inspections. That conclusion is apparent from reading of the second sentence: "Any producer making any such guarantees shall at all time prior to shipment have the option to determine whether or not said potatoes shall be inspected in accordance with this subsection". Nothing in that sentence, however, indicates that such a guarantee ceases to exist beyond the shipping point of the grower.

If the Legislature intended that a grower of potatoes in the State not be afforded the opportunity of guaranteeing his product to destination, it has not so stated.

> "We are ascertaining here not what the Legislature may have meant by what it said but rather are deciding what that which the Legislature said means." *State v. Millett,* 160 Me. 357, 360.

JOHN W. BENOIT, JR.
Deputy Attorney General

September 1, 1971
Executive

Kermit V. Lipez, Administrative Assistant

Indian Reservations – Local Liquor Options

SYLLABUS:

The Indian Island Voting District has properly authorized sale of table wine for consumption off premises, by affirmative vote on that local option question on November 3, 1970, pursuant to 28 M.R.S.A. § 102, which empowered such vote in a "municipality or unincorporated place," it being an "unincorporated place" within the meaning of that statute. It has not voted on the sale of malt liquor option. 28 M.R.S.A. § 103 provides Indian Reservations a procedure for authorizing all local liquor options.

FACTS:

It appears that on November 3, 1970 the Indian Island Voting District voted affirmatively, 48 to 11, on local option question 6A – the sale of table wine for consumption off the premises.

QUESTIONS:

1. Have the voters of Indian Island Voting District, acting pursuant to 28 M.R.S.A. § 102, properly authorized the sale of table wines not to be consumed on the premises?
2. Are there any records indicating that the voters of Indian Island Voting District have authorized the sale of malt liquor not to be consumed on the permises?
3. Regardless of the answer to question 2, does 28 M.R.S.A. § 103 provide the Indian Reservations with a procedure for authorizing the sale of malt liquor not to be consumed on the premises, as well as all other local option questions?

ANSWERS:

1. Yes.
2. No.
3. Yes.

REASONS:

Relative to question 1:

Section 9 of Chapter 360 of the Public Laws of 1969 amended section 102 of Title 28 of the Revised Statutes by adding a new paragraph at the end providing:

> "Table wines not to be consumed on the premises may be sold by licensees in a municipality or unincorporated place where a majority of votes cast in the municipality or unincorporated place at the general election in November 1970, are in the affirmative to the following local option question:
>
> Shall licenses be granted in this city or town for the sale herein of table wines not to be consumed on the premises?"

It appears from the stated facts that the Indian Island Voting District did in fact

undertake a vote on the local option relative to sale of table wines not to be consumed on the premises, and that such vote was in the affirmative. The decisive issue on the first question posed is whether or not the above-quoted new paragraph of 28 M.R.S.A. § 102 empowered the "Indian Island Voting District" to take such a vote. That paragraph authorized such a vote by a "municipality or unincorporated place." The word "municipality" as used in the above-quoted paragraph includes "cities, towns, and plantations." 1 M.R.S.A. § 72, subsection 13. While the Indian Island Voting District is not a city, town or plantation, it would seem to be an "unincorporated place" within the meaning of the reference paragraph.

There is nothing within Title 28 which expressly or impliedly excepts the Indian Island Voting District from inclusion within the above-quoted paragraph. In an Opinion of the Attorney General of the State of Maine, found on page 48 of the Annual Report of that official for 1903-1904, it was held that this "Indian Reservation is State land and an unincorporated place . . . " It further appears that this local option question was in fact submitted by the Secretary of State to the Indian Island Voting District for its vote thereon, and that such vote was subsequently recorded by that official. Such contemporaneous administrative interpretation by that official is worthy of consideration in construing the applicability of the reference new paragraph of Section 102 of Title 28.

I can find no sound reason that might tend to militate against the applicability of the reference paragraph to the Indian Island Voting District. Title 28 provides for local consideration of license applications, i.e., by the Penobscot County Commissioners. For example, see 28 M.R.S.A. §§ 103 and 252. The existing machinery for State Administration, supervision and law enforcement are available for operation over such a place:

> "The jurisdiction and sovereignty of the State extend to all places within its boundaries . . . " 1 M.R.S.A. § 1.

In the words of the Supreme Judicial Court of Maine in *State v. Newell,* 84 Me. 465, 466 (1892):

> "Whatever the status of the Indian tribes in the west may be all the Indians of whatever tribe, remaining in Massachusetts and Maine, have always been regarded by those States and by the United States as bound by the laws of the State in which they live. *Danzell v. Webquish,* 108 Mass. 133; *Murch v. Tomer,* 21 Maine, 535. Their position is like that of those Cherokees who remained in North Carolina. It was said of them by the United States Supreme Court, in *'Cherokee Trust Funds,'* 117 U.S. 288, that they were inhabitants of North Carolina and subject to its laws."
>
> Also see Opinion of this Department to the State Tax Assessor dated February 6, 1953, holding that a statute which imposed a tax on sales at retail "in this State" applied to such sales within Indian reservations.

Relative to question No. 2:

The Office of the Secretary of State has informed me that it has no records of any vote whatever on the question of sale of malt liquor not to be consumed on the premises.

Relative to question No. 3:

Each of the Indian Reservations is an "unincorporated place" within the meaning of

28 M.R.S.A. § 103, for the reasons elaborated hereinabove. This latter section does provide the procedure whereby the voters of each such place can authorize the sale of malt liquor not to be consumed on the premises, as well as all the other local option questions specified in 28 M.R.S.A. § 101. Such procedure must be initiated by "petition signed by 20% or more of the persons resident in an unincorporated place . . . . requesting a vote on local options questions . . . ."

CHARLES R. LAROUCHE
Assistant Attorney General

September 13, 1971
Real Estate Commission

Leo M. Carignan, Executive Secretary

6 month and 3 month residency requirement

SYLLABUS:

The requirement that an applicant, for a real estate broker's or salesman's license, must be a resident who has maintained a residence in this State for six months and in a municipality for three months is an unconstitutional requirement.

FACTS:

An applicant for a real estate broker's or salesman's license is required to be a resident of this State qualified to vote in municipal and State elections. To be qualified to so vote one must, inter alia, have established a residence in this State for six months and in a municipality for three months.

QUESTION:

Whether the six month and three month time limitations imposed upon residents of this State is a constitutionally condoned limitation.

ANSWER:

No.

REASON:

The qualifications for a resident broker's or salesman's license are provided for in 32 M.R.S.A. § 4103 (1) (B), which provides in pertinent part:

> "1. Qualifications. An applicant for a real estate broker's or salesman's license shall submit to the commission written evidence, verified by oath that the applicant:
>
> * * * *
>
> "B. Is a resident of the State, qualified to vote in municipal and state elections prior to his application;"

The above statute establishes a discrimination on the basis of residents who are qualified to vote as opposed to those who are residents but have not met the

qualifications necessary to vote. Included in the requirements to vote are the requirements that one establish a residence in this State for at least six months, and in a municipality for at least three months, 21 M.R.S.A. § 241. The critical question is whether such a discrimination is constitutionally condoned. The statute established two classes of applicants who, we must assume, have met all of the other requirements of 32 M.R.S.A. § 4103, such as education, age, competency and moral character, except one class is not qualified to vote. On this basis, the Legislature has denied to one class, otherwise qualified, the right to enter a profession.

To support such a discrimination, it must appear that some justifiable and compelling governmental interest is being furthered. [1] *Shapiro v. Thompson,* 89 S.Ct. 1322, 394 U.S. 618, 22 L.Ed.2d 600 (1969).

Since the six month and three month residency requirement is the qualification which we are here concerned with, it will not be necessary to consider the other qualifications that one must have to vote under 21 M.R.S.A. § 241.

The question narrows down to whether the State has any justifiable and compelling interest that would be furthered by extending to one class of residents, namely those who have resided in this State for six months and in a municipality for three months, the right to act as a real estate broker or salesman while denying the same right to one who qualifies in all respects except he has not satisfied the six month and three month waiting periods.

The United States Supreme Court in *Shapiro v. Thompson,* supra, declared a welfare statute, which required that applicants for welfare in that state, be a resident of that State for one year, as unconstitutional. In doing so the Court said of that one year waiting period:

> "On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist . . . On reargument, appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. We agree. The interests which applicants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests." 22 L.Ed.2d at 611.

In the broad general sense this State may not deny to any person within its jurisdiction the equal protection of its laws. This State may, however, treat different classes of persons differently if there are valid differences between the classes. Whether or not the difference is a valid one must be determined in light of the purposes underlying the law creating the different classes.

Additionally, the privileges and immunities clause of the Constitution prohibits classifications based on non-citizenship unless there is something to indicate that the non-citizens are a peculiar source of the evil which the statute is aimed at curing. [2]

1) It should be emphasized that the constitutionality of the six month requirement for purposes of the right to vote is not at issue in this opinion. One year residency requirements for voting purposes have been upheld. Cf. *Cocanower v. Marston,* 318 F.Supp. 402 (1970). But Cf. *Lester v. Board of Elections for District of Columbia,* 319 F.Supp. 505 (1970); *Affeldt v. Whitcomb,* 319 F.Supp. 69 (1970).

2) It should be noted that the issue here presented does not concern the other requirements of 21 M.R.S.A. § 241 (1), and I express no opinion with respect to the constitutionality of those requirements.

Toomer v. Witsell, 68 S.Ct. 1156, 334 U.S. 385, 92 L.Ed. 1460. Rehearing denied 69 S.Ct. 12. 335 U.S. 837, 93 L.Ed. 389, (1948). See also *Russo v. Reed,* 93 F. Supp. 554 (1950). Where a Maine statute which discriminated against non-residents was struck down.

The fact that the right here involved is one given by state statute and not one necessarily guaranteed by the Federal Constitution, does not insulate that right from the dictates of the 14th Amendment. U.S. ex rel. *Keating v. Bensinger,* 322 F.Supp. 784 (1971).

The reasonableness of the discrimination between residents of six months or more and those who are residents for less than six months must, in the final analysis, be tested in light of this State's interests.

This State's interests are disclosed through an analysis of the purposes of the real estate brokerage laws.

In general the purposes underlying such laws are to protect the public against fraud and incompetency in real estate transactions. *Dupeck v. Union Ins. Co. of America,* 329 F.2d 548 (1964); *Wickersham v. Harris,* 313 F.2d 468 (1963). *State v. Rose,* 97 Fla. 710, 122 So. 225 (1929).

Consistent with those purposes, this State could, as it has done, require that applicants for a broker's or salesman's license meet certain minimum educational requirements, demonstrate minimum competence in real estate transactions and demonstrate their honesty and good character. Assuming that one has satisfied all of the standards established in the above areas, what legitimate reasons could that legislature have for imposing an additional six month and three month waiting period? How can it be said that one person who has met all of the requirements, other than the waiting period, is any less qualified to practice in the profession than one who has completed the waiting period?

The resident for a day is entitled to the same rights and privileges under this State's laws as the resident of six months unless there appears at least a reasonable basis for denying him those rights.

I find no reasonable basis for such a denial and must therefore conclude that the six month and three month residency requirements for obtaining a broker's or salesman's license is unconstitutional.

CLAYTON N. HOWARD
Assistant Attorney General

September 23, 1971
Education

Kermit S. Nickerson, Deputy Commissioner

Legality of Construction Subsidy Paid District on Basis of Lease-Purchase Payments.

SYLLABUS:

State construction subsidy can legally be paid an administrative unit on the basis of individual "lease-purchase payments" made to a building contractor by the unit for capital outlay purposes (two-bay addition to school bus garage).

FACTS:

School Administrative District No. 9 directors have voted the purchase of a two-bay addition to the existing schoolbus garage under a "lease-purchase agreement". The plan calls for lease payments to the construction contractor over a 5-year period. The directors have requested that the Department of Education seek a ruling from the Attorney General on the question of legality of such a plan. The Department of Education will be involved in the matter when processing the district's request for State construction assistance (subsidy) on the individual lease-purchase payments made by the District.

QUESTION:

Whether State construction subsidy can legally be paid the district on the basis of individual "lease-purchase payments" made to a building contractor by the district for capital outlay purposes?

ANSWER:

Yes, provided applicable statutory provisions are met, a copy of the proposed agreement is presented to the State Board of Education, and the statutory debt limit is not exceeded.

REASON:

Initially, the district must apply to the State Board of Education for construction subsidy on the project. *20 M.R.S.A. § 3458.* Such an application should be accompanied by a copy of the proposed lease-purchase agreement. Too, the statutory debt limit must not be exceeded.

The arrangement contemplated by the district is analogous to the lease-purchase procedure utilized by the Maine School Building Authority with administrative units for the construction and acquisition of school buildings. We do not rest the legality of the reference plan upon the cited analogy; but rather upon the fact that none of the provisions appearing in the statutes relating to education (Title 20) bar the payment of State subsidy for capital outlay purposes under a lease-purchase plan. The term "capital outlay purposes", as used in 20 M.R.S.A. § 3457, means, among other things, the cost of new construction. The fact that the district's cost of new construction will be expended in installments does not bar the project from qualifying for construction subsidy.

We have noted in the facts that the directors of the district requested the Department of Education to obtain a ruling from the Attorney General on the legality of the plan. We answer that question indirectly by ruling that if the district enters into a valid lease-purchase agreement with a contractor for acquisition of capital improvements, payment of State subsidy to the district on the basis of the district's lease-purchase payments is not barred by statute.

The State's payment of subsidy is protected in this matter by reason of the fact that the Governor and Council, whenever they have reason to believe that an administrative unit has neglected to faithfully expend school money received from the State or has failed in any way to comply with the law prescribing the duties of administrative units, may direct the Treasurer of State to withhold an amount of money, as they may deem expedient, from the moneys apportioned to that administrative unit, until the Governor and Council are satisfied that the administrative unit has complied with statutory

requirements. *20 M.R.S.A. §'854.* Thus, in the event State construction subsidy were paid the district under such a lease-purchase plan which was not (for some reason) later fully performed, so that the administrative unit did not realize acquisition of a capital construction fixture, reimbursement of the State subsidy would be in order; and failure of the district to so reimburse the State would be grounds for withholding the sum under the cited statute.

JOHN W. BENOIT, JR.
Deputy Attorney General

October 5, 1971
Wetlands Control Board

Ronald Greene, Chairman

Municipal Jurisdiction of Proposed Dredging in Coastal Wetlands

SYLLABUS:

The question of which municipality has jurisdiction over a proposed dredging activity is one that must be resolved among the applicant and the municipalities, and the Wetlands Control Board may render its decision without regard to this issue.

FACTS:

Pursuant to the provisions of Title 12 M.R.S.A. §§ 4701-4709, the so-called Wetlands Act, Maine Yankee Atomic Power Company has applied for a permit to dredge a channel in coastal wetlands within the Town of Wiscasset. The applicant notified the municipal officers of Wiscasset and the Wetlands Control Board and requested a permit for the dredging. A hearing was held by the municipal officers of Wiscasset, at which time the municipal officers of two adjacent towns appeared and alleged that they represented "municipalities affected" within the meaning of § 4701, and thus rightly had concurrent jurisdiction with municipal officers of Wiscasset to conduct a public hearing and rule on the application.

The neighboring municipalities allege that they will be "affected" by changes in tides and current patterns, siltation, loss of clam and marine worm flats utilized by local fishermen, and other indirect effects resulting from the proposed dredging. They have petitioned the Board to withhold its decision on the grounds that procedural defects occasioned by the failure of the applicant to apply to each "community affected" prevents the Board from rendering a decision.

No evidence was presented disputing the allegation that the dredging would occur solely within the boundaries of the Town of Wiscasset. For purposes of this opinion, it is assumed that the proposed dredging will take place solely within the municipal boundaries of Wiscasset.

QUESTION:

1. May the Wetlands Control Board rule on an application for a permit without regard to the issue of municipal jurisdiction?
2. What is the meaning of "municipality affected" as used in § 4701?

ANSWER:

1. Yes.

2. Since question No. 1 is answered in the affirmative, there is no need to answer question No. 2.

REASONING:

1. The Wetlands Control Act, provides that no person may alter a coastal wetland without the dual approval of the "municipality affected" and the Wetlands Control Board. The Act requires that the applicant notify the Board and the municipal officers prior to the alteration, and that the municipality hold a public hearing. Either the municipal officers or the Board may withhold approval should they conclude that the proposed alteration would result in certain adverse effects as enumerated in § 4702 of the Act.

Nowhere does the Act specifically limit the powers of the Board to acting only after the municipality has conducted a hearing and rendered a decision. Nor does the Act require that the Board must determine which municipality must issue the permit. The only provision which appears to touch on this issue is found in § 4701, paragraph 4, which requires the municipal officers to notify the Board within 7 days of the results of their decision. There is no reason to conclude from this language that the Legislature intended to prohibit the Board from acting prior to such municipal notification. Rather, the provision appears to be designed for the purpose of keeping the Board apprised of the decision of the municipal officers. The local decision has no evidentiary value to the Board in making its decision. It is likely, of course, that the Board may desire to know the decision of local officials prior to formulating its own decision. In fact, that has been the informal practice of the Board. Nevertheless, the language of the statute does not compel the Board to wait.

What little legislative history there is on the act seems to support the conclusion that the notice by the municipality to the Board is purely for informational purposes. The original Act, Chapter 348 of the Public Laws of 1967, contained no such requirement. It did, however, require the permit to be issued by the municipality within 7 days after the public hearing conducted by the municipality, provided both the municipality and the Board approved. In Chapter 379 of the Public Laws of 1969, the 7-day limitation was changed to 30 and the notification provision was added. Presumably the notification section was added so that the Board might be advised as to when the hearing had been held and the decision of the municipality rendered.

It is also evident from the Act that the Board is free to act without any hearing or evidence. The Board's decision is not in any way dependent on the municipal decision or evidence developed at such hearing. Since the Board meets *in camera,* it may consider such evidence as it chooses. It is irrelevant to the Board which community has jurisdiction over the application or whether the municipal hearing comported with the statutory notice provisions in § 4701. The Board merely examines the activity in light of the statutory criteria and renders its decision. The Board itself does not issue permits. It merely has the authority to approve, disapprove or approve with conditions. The actual permit itself is issued by the municipal officers. See § 4702, first sentence and § 4702, paragraph 2. Though this procedure is rather unusual, it supports the conclusion that the Board is independent of the municipality, both in the procedure it follows and in the substance of its decision. The issue of municipal jurisdiction is one to be resolved by the applicant and the communities involved. Any other conclusion would require the Board to act as a court of law and determine in each case the meaning and scope of the words "municipality affected."

If any other municipality wishes to assert its jurisdiction over the activity in question it must resolve the issue with the applicant. If it is determined that the proposed dredging requires a permit from other municipalities, then of course, such permits must be obtained prior to undertaking the proposed work.

2. In view of the above conclusion, it is not necessary for us to decide the meaning of "municipality affected".

JOHN M. R. PATERSON
Assistant Attorney General

October 18, 1971
Bureau of Taxation

Neal Bodwell, Director, Excise Tax Division

Subject: Taxability of Variable Annuity Insurance

SYLLABUS:

THE PAYMENTS RECEIVED EACH YEAR BY AN ANNUITY COMPANY ON ANNUITY CONTRACTS FROM THE CONTRACT OWNER ARE TAXABLE AS ANNUITY CONSIDERATIONS IN THE YEAR WHEN RECEIVED AND NOT AT A SPECIFIED TIME IN THE FUTURE WHEN THE ACCUMULATED PAYMENTS ARE CONVERTED TO PURCHASE ANNUITIES.

FACTS:

The ITT Variable Annuity Insurance Company is a South Carolina Corporation licensed by the State of Maine Insurance Commissioner to do business in the State of Maine. The company sells annuity contracts, individual and group, fixed and variable. The annuity contracts considered in this opinion are those in which the prospective annuitants are Maine residents and under the contract terms there are provisions for an accumulation of funds until a specified time in the future, at which time the funds are applied to purchase an immediate life annuity. The ITT Variable Annuity Insurance Company contends that the periodic purchase payments by the contract owner to the company in the case of the individual annuity contracts and the periodic contributions by the contract owner to the company on behalf of prospective Maine Resident annuitants in the case of group contracts are not subject to the tax on annuity considerations under the provisions of 36 M.R.S.A.§2513 until the specified time in the future when the accumulated purchase payments or contributions are used to purchase an immediate life annuity.

The ITT Variable Annuity Insurance Company has provided annuity contract forms which are attached hereto and are referred to in this opinion. The funds used to purchase the fixed annuities are kept in so-called general accounts and the funds used to purchase the variable annuities are placed in so-called separate accounts. The annuities purchased are measured in annuity units for accounting purposes, the number of units varying with the amount of funds that have accumulated in the general or special accounts.

QUESTION:

Are annuity contracts issued by an out-of-state annuity company licensed to do

business in the State of Maine, that provide for the accumulation of funds for the purchase of an annuity (fixed or variable) (individual or group) at some time in the future, the prospective annuitant being a resident of the State of Maine, subject to the tax on the payments received by the annuity company from the contract owner as annuity considerations pursuant to 36 M.R.S.A. § 2513 for the year when received or at the time when the accumulated funds are converted into an annuity.

ANSWER:

The payments received by the annuity company pursuant to such annuity contracts are taxable as annuity considerations for the year when received.

REASONS:

36 M.R.S.A. § 2513 provides:

> "Every insurance company or association which does business or collects premiums or assessments including annuity considerations in the State, except those mentioned in sections 2511 and 2517, including surety companies and companies engaged in the business of credit insurance or title insurance, shall, for the privilege of doing business in this State, and in addition to any other taxes imposed for such privilege annually pay a tax upon all gross direct premiums including annuity considerations, whether in cash or otherwise, on contracts written on risks located or resident in the State for insurance of life, annuity, fire, casualty and other risks at the rate of 2% a year."

The insurance companies excepted from the provisions of 36 M.R.S.A. § 2513, are those mentioned in 36 M.R.S.A. § 2511, being insurance companies or associations organized under the laws of the State of Maine, and those mentioned in 36 M.R.S.A. § 2517, being mutual fire insurance companies incorporated under the laws of other states.

The annuity considerations subject to tax under 36 M.R.S.A. § 2513 are those considerations on annuity contracts written on risks resident in the State of Maine, with the exception of certain non-taxable annuity considerations set forth in 36 M.R.S.A. § 2514 as amended by P.L. 1967 C. 453 and P.L. 1969 C. 412.

We construe the term "annuity considerations" in 36 M.R.S.A. § 2513 to include consideration which the individual annuity contract owner pays annually to the annuity company in cash or otherwise for an annuity contract when the prospective annuitant is a Maine Resident and under its terms an annuity is to be purchased with the accumulated funds; or in the case of a group annuity contract that portion of the consideration which the group policy contract owner pays annually in cash or otherwise under a group annuity contract which is accumulated and allocated for the purchase of annuities on covered participants residing in the State of Maine. The term "annuity considerations" in 36 M.R.S.A. § 2513 are the considerations for annuity contracts.

We look now to the contract forms that have been supplied us to determine what the consideration for the annuity contract is, as stated by the ITT Variable Annuity Insurance Company.

The front page of the Individual, Flexible Payment, Deferred Annuity Contract (Form V-3000) reads in pertinent part:

> "This Contract is issued in consideration of the Application, a copy of which is attached to and made a part of this Contract and the payment of the Purchase Payments in accordance with the terms and conditions of this Contract."

The purchase payments referred to are payments which are paid by the contract

owner to the ITT Variable Annuity Insurance Company and which accumulate in accounts for the purchase of an immediate life annuity at a specified time in the future. We are satisfied that pursuant to 36 M.R.S.A. § 2513 the annual amount of purchase payments received under such a contract is an annuity consideration and is subject to tax for the year when received. It should be noted that the attorneys who drafted this contract form recognized that taxes might be due to certain states or municipalities as it was provided in the first paragraph of Section 1 of the Valuation Provision of the Contract Form that:

> "The Net Purchase Payment is equal to the Purchase Payment less deductions totaling 8.50% (6% for sales expenses, 1.75% for administrative expenses and .75% for the minimum death benefit) plus *any applicable premium taxes.*" (Emphasis supplied)

Form V-3001 is an Individual Single Payment Immediate Annuity Contract Form. This contract form differs from V-3000 Individual, Flexible Payment, Deferred Annuity, Contract Form in that Form V-3001 provides for just one purchase payment. The consideration language of the latter form is as follows:

> "This Contract is issued in consideration of the application, a copy of which is attached to and made a part of the contract, and the payment of the Total Purchase Payment in accordance with the terms and conditions of the Contract which is due in one sum on the Date of Issue."

The single purchase payment is subject to a tax in the year when made as an annuity consideration pursuant to 36 M.R.S.A. § 2513.

One of the two forms relating to Group Contracts furnished this office for the purposes of this opinion is a certificate issued to employee participants, which certificate evidences the employee's entitlement to certain benefits under the Group Annuity Contract. This certificate form (V-4001) states:

> "All matters pertaining to such benefits are subject to the terms and conditions of the said Group Contract and the description following is merely a summary or excerpt of some of the provisions of the Group Contract as they affect the participant."

Thus, we look to the first page of Group Annuity Contract Form (V-4000) and find the ITT Variable Annuity Insurance Company issues the Group Annuity Contract to the contract owner "in consideration of the application therefor and of the payment by contract owner of contributions as provided herein." The contributions referred to are the amounts payable on behalf of each employee who is an individual participant in the plan. Section 3A of the form reads as follows:

> "Each Contract Year The Company shall receive such contributions from the Contract Owner as are made in accordance with the requirements of the Plan. Such contributions will be applied by The Company to provide accumulation units for each Participant in accordance with Section 3(B) and the instructions of the Contract Owner."

Section 3B of the form reads in pertinent part as follows:

> "Deductions totaling 6% (5¼% for sales and administrative expenses and ¾% for the minimum death benefit guarantee) plus any applicable premium taxes on the contributions shall be made by The Company from each contribution received . . . "

It is thus apparent the ITT Variable Annuity Insurance Company was aware that premium taxes could be due and owing on the contributions. Those contributions received and allocable to employee participants resident in the State of Maine are subject

to a tax for the year received under the provisions of 36 M.R.S.A. § 2513 as an annuity consideration.

JEROME S. MATUS
Assistant Attorney General

November 10, 1971
Education

Elwood A. Padham, Assistant Commissioner

Interpretation of grants to regional technical vocational centers.

SYLLABUS:

A School Administrative District, which regularly operates a regional technical and vocational center in its own district, cannot receive state aid as reimbursement for its operation and administration of an evening adult vocational education program located in another school administrative district.

FACTS:

The Lake Region School District, School Administrative District (S.A.D.) No. 61, which is located in Bridgton, Maine, has a regional technical vocational center as part of the comprehensive high school. When evening programs are offered at this regional center, 90% of the cost of instruction for approved part-time and evening classes is paid by the State of Maine, pursuant to 20 M.R.S.A. § 2356-B(2), and the remaining 10% of the cost of instruction is paid by S.A.D. No. 61.

School Administrative District No. 17, which is located in South Paris, Maine, does not have a regional technical and vocational center; however, it pays the tuition for its secondary level students who are sent to the regional technical and vocational center operated by S.A.D. No. 61 in Bridgton.

A plan has been presented to the Maine Department of Education whereby S.A.D. No. 61, in Bridgton, would operate and administer an adult vocational education program that would be located in South Paris (S.A.D. No. 17), as a "satellite center" to the regional technical and vocational center in Bridgton. Under the proposed plan, S.A.D. No. 61 would be applying to the State for reimbursement, in the amount of 90% of its cost of instruction resulting from the adult vocational education program to be conducted at South Paris, and S.A.D. No. 17 would be required to pay the remaining 10% of said cost.

QUESTION:

Can a school administrative district, which regularly operates a regional technical and vocational center in its own district, receive State aid as reimbursement for costs of instruction resulting from its operation and administration of an adult vocational education program located in another school administrative district?

ANSWER:

No.

REASONS:

This opinion is based upon the finding that, by the provisions of 20 M.R.S.A. § 2356-B(2) and other related sections, the Legislature intended that State aid be granted by the Commissioner of Education, as reimbursement for costs of instruction in connection with approved part-time and evening adult vocational education programs, *only* when such programs are offered by an administrative unit at an approved regional technical and vocational center which is operated by said administrative unit.

The language found in the introductory paragraph of section 2356-B specifically provides that the Commissioner of Education shall make grants for construction and cost of instruction as described in subsections 1 and 2 of section 2356-B.

> "when any administrative unit has constructed, subsequent to the effective date of this Act, an approved facility to be used as a *regional technical and vocational center* . . . or shall maintain and operate such a *regional technical and vocational center* in a facility . . . which is approved by the State Board of Education for the maintenance and operation of such a center." (Emphasis supplied)

Furthermore, section 2356-F specifically provides that:

> " . . . any adult or out-of-school youth seeking to attend part-time or evening programs, where offered, whether such courses are free or are subject to payment of tuition charges either by the prospective student or by the administrative unit where he resides . . . may attend any *regional technical and vocational center* established under sections 2356-A and 2356-G *which serves his area,* as defined in section 2356-A . . . " (Emphasis supplied)

This quoted language of section 2356-F indicates that it is intended that an adult seeking to attend a part-time or evening technical or vocational program should attend such a program at a State approved regional technical and vocational center established under section 2356-A and 2356-B, which serves the area of the State where he resides.

Finally, a reading of the entire legislative Act, by which the statutory provisions referred to and quoted from in this opinion were enacted, reveals that, when enacting this legislation, the Legislature made no provision for the granting of State aid for the instructional costs of a "satellite adult vocational education program", such as the program which is the subject of this opinion, where the program would be conducted by a school administrative district at a location other than that of a State approved regional technical and vocational center. Therefore, under the facts presented, School Administrative District No. 61 in Bridgton could not receive State aid as reimbursement for its instructional costs resulting from its operation of an adult vocational education program located in a school building operated by S.A.D. No. 17 in South Paris, Maine.

CRAIG H. NELSON
Assistant Attorney General

November 22, 1971
State

Peter M. Damborg, Deputy Secretary of State

SYLLABUS:

A candidate for political office, who has won his own party's primary election, and who has won a second party's primary election by virtue of write-in votes, is not disqualified from accepting nominations of both parties.

FACTS:

The nomination of a candidate by a party for any state or county office must be made by primary election. 21 M.R.S.A. § 441. A person whose name does not appear on the ballot can be a "write-in candidate".[1)]

A candidate for nomination by primary election must become qualified by filing a primary petition and written consent. 21 M.R.S.A. § 444. "Cross-filing" in more than one party by a single candidate in the primary elections has been prohibited by Chapter 89 of P.L. 1971. That statute provides:

> "[A candidate for nomination by primary election] must be enrolled, on April 1st, in the party named in the petition. The registrar of voters in his municipality of residence shall certify to that fact upon the petition."

QUESTION:

Can a candidate accept the nomination of two political parties where, in the primary of his party of enrollment he has duly filed and circulated primary petitions to have his name on the ballot, and in the other party's primary he receives a winning number of write-in votes?

ANSWER:

Yes.

REASONS:

The intent of the Legislature in requiring a candidate's enrollment in the party named in the primary petition was to prevent cross-filing by a single candidate in the primary elections. But such intent must be presumed not to encompass write-in candidates. Of the many changes made in the election laws during the 105th Legislative session, none has disqualified a person selected by write-in votes from accepting the nomination, whether or not he is enrolled in that party, and even if he is also the nominee of another party.

JOHN KENDRICK
Assistant Attorney General

November 23, 1971
Maine Land Use Commission

James S. Haskell, Jr., Executive Director

Jurisdiction of Maine Land Use Commission over Mainland Plantations.

SYLLABUS:

Mainland, as well as island plantations are subject to the provisions of 12 M.R.S.A.

1) The election laws contain several provisions for write-in candidates, e.g. 21 M.R.S.A. § 1, sub-§ 45, § 451, including printed instructions which must appear at the top of each ballot. 21 M.R.S.A.§701, sub-§2.

§ § 681-689 as enacted by P.L. 1969, c. 494 and amended by P.L. 1971, c. 457, hereinafter called the Maine Land Use Regulation Law.

QUESTION:

Are mainland plantations included within the definition of "unorganized and deorganized areas" in 12 M.R.S.A. § 682.1 and thus subject to the provisions of the Maine Land Use Regulation Law?

ANSWER:

Yes.

REASONING:

"Unorganized and deorganized areas" of the State of Maine are subject to the provisions of the Maine Land Use Regulation Law pursuant to the provisions of 12 M.R.S.A. § §683, 685-A and 685-C, as amended. 12 M.R.S.A. § 682.1 defines these areas as follows:

> "Unorganized and deorganized areas shall include the unorganized and deorganized townships and mainland and island plantations of the State and shall not include Indian reservations."

If the words "townships" and "mainland" *do not* describe the same land areas, it could be argued that the words "unorganized" and "deorganized" modify both the words "townships" and "mainland". (Alternatively, it could be argued that the words "unorganized" and "deorganized" modify only "township" and "mainland" and "island" modify "plantations".) If the words "townships" and "mainland" *do* include within their meanings the same land areas, then one of these two words would be redundant unless "mainland" is read to modify "plantations".

In the State of Maine a township is a mere geographical division of territory into an area 6 miles square and is not, as it is elsewhere in the United States, a political subdivision of the State. The word "mainland" is not defined by statute and thus should be afforded its ordinary meaning so long as that meaning is consistent with the legislative intent of the statute within which it appears. That is, the word "mainland" means simply "a continuous body of land constituting the chief part of a country or continent" and obviously includes with it those areas of the State known geographically as "townships". Thus, it would appear that the word "mainland" includes "townships".

Therefore, to avoid a construction of the statute which would result in the word "mainland" or the word "township" being redundant, because it is to be assumed that the Legislature did not intend that any word in a statute be redundant, one must construe "mainland" as modifying the word "plantation".

Finally, since the environmental harm likely to result from the uncontrolled development of "mainland plantations" is similar to the environmental harm likely to result from the uncontrolled development of "island plantations", it is reasonable to conclude that the legislative intent was to subject "mainland plantations" as well as "island plantations" to the jurisdiction of the Maine Land Use Commission.

In short, "where the language of a statute is plain, it must be given its plain and obvious meaning". *Pease v. Foulkes,* 128 Me. 293, 147 A. 212 (1929).

E. STEPHEN MURRAY
Assistant Attorney General

December 9, 1971
Retirements & Pensions

Edward L. Walter, Exec. Secretary

Election of Retirement Benefits under Section 1124(3)

SYLLABUS:

A beneficiary of a deceased member who was eligible for retirement at the time of death may elect the benefits due a beneficiary of a member who died before being eligible for retirement without meeting the 18 month creditable service requirement.

FACTS:

A deceased member was eligible for retirement at the time of his death and now his designated beneficiary seeks to elect the benefits provided for under 5 M.R.S.A. § 1124(3). Section 1124(3) does not specify any specific benefits but it does permit a beneficiary to elect certain benefits which are available when the deceased died before reaching eligibility for retirement. The beneficiary has elected, under § 1124(3) to receive the benefits provided for under § 1124 1B(1) (a). Section 1124 1B(1) (a) limits the benefits provided therein those situations where the member had at least 18 months of creditable service within the 42 months prior to date of death. The member in question did not meet that requirement.

QUESTION:

Is it necessary for a deceased member who was eligible for retirement to also meet the 18 months of creditable service requirement for members not eligible for retirement before his beneficiary is entitled to those benefits?

ANSWER:

No.

REASONS:

The death benefits available upon the death of a member of this State's Retirement System may generally be broken down into 3 categories, namely, death before eligibility for retirement, death after eligibility for retirement but before actual retirement, and death after retirement. As one would expect, the benefits are generally greater when the deceased has recently retired and they become less in the case of one who has reached eligibility for retirement, and still less in the case of one who had not reached eligibility. The retirement laws place a premium on eligibility for retirement.

In a case where the deceased member was eligible for retirement, the estate or beneficiaries of the deceased are entitled to benefits not generally available when the deceased was not eligible for retirement. However, in addition to the special allowances

made for eligibles under § 1124(2), the law also gives to certain beneficiaries, or the members' estate, all of those benefits which would be available if the member had not been eligible for retirement. In such a case section 1124(3) permits designated beneficiaries to elect to take their benefits under § 1124(1) or under § 1124(2).

Section 1124(3) states in this regard that:

" . . . The designated beneficiary if a spouse . . . may elect to receive either the benefits provided under subsection 1 or those provided under subsection 2, paragraph A or B but not both."

In the present case the designated beneficiary wishes to elect to receive the benefits provided for under subsection 1, paragraph B, subparagraph (1). However, subparagraph (1) requires as a condition of eligibility that one have had at least 18 months of creditable service within the 42 months prior to date of death. The deceased member here involved did not meet that requirement.

The question here presented is whether a member must have met the requirements of subsection 1 B(1)(a) before his beneficiary may elect those benefits. More specifically, the question is whether the deceased member must have met the 18 months of creditable service before his beneficiaries may elect to receive the $100 monthly benefits provided for under § 1124 1 B(1)(a).

Obviously the earlier-quoted language of subsection 3 does not expressly impose the conditions of subsection 1 on one electing the benefits thereof.

To imply that any election of the benefits of subsection 1 must be conditioned upon the limitations of that subsection would be to imply a limitation inconsistent with the general purposes of § 1124.

Subsection 3 provides a means whereby one eligible for retirement may obtain the benefits of one not eligible. If one were eligible to retire and had also met all of the conditions of subsection 1, then his beneficiaries would also be entitled to the benefits of that subsection without the authority of subsection 3. If subsection 3 is to be given any meaning and if the general principle of bestowing additional benefits on those eligible for retirement is to be furthered, then an election under subsection 3 must not be conditioned upon fulfilling the limitations of subsection 1.

In conclusion, one may elect under § 1124(3) to receive the benefits of § 1124 1B (1)(a) without having first completed 18 months of creditable service.

CLAYTON N. HOWARD
Assistant Attorney General

December 17, 1971
Education

Asa A. Gordon, Ass't. Commissioner,
School Admins. Services

School Committee's Acceptance or Rejection of High School Tuition Students.

SYLLABUS:

Whether a school committee must comply with a vote of the administrative unit that certain tuition students be accepted is not a State question. When voters of an

administrative unit elect not to receive tuition students in the future, the sending administrative units are entitled to notice of the fact and tuition students must be received over the next two years before discontinuance, provided the receiving unit qualifies for school construction aid under 20 M.R.S.A. § 3457.

FACTS:

Section 9 of Chapter 223 of the Public Laws of 1971 is as follows:

> "Whenever authorized by the appropriate legislative body, the school committee or school directors may accept students from outside the administrative unit, and the sending unit or family shall pay such tuition as may be fixed by such committee or directors not to exceed legal tuition rates."

Section 35-A of Chapter 530 of the Public Laws of 1971 amended the second sentence of the second paragraph of § 3457 of Title 20 to read as follows:

> "Any administrative unit qualifying for school construction aid under this section which receives tuition students from surrounding municipalities must render at least 2 years' notice to the sending municipalities before discontinuing such acceptance."[1)]

Your memorandum suggests as fact that an administrative unit votes to authorize its school committee to accept students only from a specified municipality. It is also assumed that several municipalities are presently sending tuition students to the receiving town in question.

QUESTIONS:

1. May the school committee of the receiving administrative unit refuse to accept any tuition students at all on the grounds that the vote of the unit was only an authorization to the school committee, not a directive to the school committee?
2. May the school committee of the receiving administrative unit exclude freshmen tuition students for the school year 1972-73 before the expiration of the 2-year period specified in § 3457, as amended by P.L. c. 530, § 35-A?
3. In the absence of a notice of discontinuance of tuition students to sending administrative units by the receiving administrative unit, is a school committee of the receiving administrative unit, which unit receives school construction aid, obliged to accept all tuition students until the expiration of the 2-year period has been realized?
4. When a receiving administrative unit votes not to accept high school tuition students, is the school committee of the receiving administrative unit required to give a notice to the sending administrative units forthwith?

ANSWERS:

1. Not a State question.
2. No.
3. Yes.
4. Yes.

1) The request for advice does not seek a definition of the phrase "2 years' notice"; if it had, we would interpret it to mean a period of two school years, as opposed to two calendar years.

REASONS:

1. The first question does not present a State issue for consideration. In the event that the voters of an administrative unit authorized their school committee to accept tuition students only from a specified sending administrative unit, and the school committee refused to accept those tuition students, the controversy would be one which required attention of counsel representing the board and the administrative unit. If this office were to give advice on such a question, it would not be in a position to support that advice by representing either the administrative unit or the school committee.

2. In answer to the second question, a school committee of an administrative unit receiving tuition students must continue to receive such students until the expiration of a 2-year period following notice given to the sending administrative units that tuition students will not be received thereafter. The Article to be voted upon should be aimed at notification of discontinuance of tuition pupils rather than to immediate discontinuance. Note that the reference notification to the sending administrative units must be given if the receiving administrative unit qualifies for school construction aid under the provisions of 20 M.R.S.A. § 3457; and the answer we give to the second question only goes to the extent of the facts assumed, i.e., that the receiving administrative unit qualifies for school construction aid.

3. What is written in the previous paragraph supports the answer to question No. 3.

4. Question 4 is really one of administration of the school committee (and may well depend upon the time when the voters of the administrative unit direct their school committee not to accept tuition students). The notice of discontinuance of acceptance of tuition pupils should be given to the sending administrative units as soon as possible so as to inform the sending administrative units of the remaining 2-year period during which they may continue to send students to the receiving unit.

JOHN W. BENOIT, JR.
Deputy Attorney General

December 22, 1971
Governor Kenneth M. Curtis
Executive

Retirement of Judges; Meaning of "Consecutive Years" in 4 M.R.S.A. § 103.

We acknowledge receipt of the inter-departmental memorandum submitted to this office by your Department under date of December 22, 1971 requesting an opinion as to the meaning of the phrase "consecutive years" appearing in Title 4, Section 103. The reference phrase appears in the first sentence of Section 103 of Title 4 as follows:

> "Any Justice of the Superior Court who resigns his office or ceases to serve at the expiration of any term thereof, after attaining the age of 70 years and after having served as such Justice for at least 7 consecutive years, or after attaining the age of 65 years and after having served as such Justice for at least 12 consecutive years, shall receive annually during the remainder of his life an amount equal to ¾ of the currently effective annual salary of a Justice of the Superior Court, to be paid in the same manner as the salaries of the Justice of said Court are paid. * * ."

The memorandum from your Department seeks the meaning of "consecutive years" and asks whether eligibility for retirement compensation requires uninterrupted service or whether eligibility may be maintained even though a lapse of time occurred between reappointments, provided the lapse occurred only within the next calendar year or a 12-month period following the end of the prior term of office.

Generally speaking, the word "consecutive" means successive, following in regular train, succeeding one another in regular order. *Bledsoe v. Johnston* (D.C. Cal.), 58 F. Supp. 129, 131. "Consecutive" ordinarily conveys the thought of unbroken sequence or uninterrupted succession. *Commonwealth v. City of Boston,* 316 Mass. 410, 55 N.E.2d 686, 687. The term "consecutive" is thought to be synonymous with "successive"; and these words are often used interchangeably. *Dever v. Cornwell,* 10 N.D. 123, 86 N.W. 227, 230; Copher v. Barbee (Mo. App.), 361 S.W.2d 137, 145.

Rules have been promulgated by the lawmakers respecting the construction of statutory words and phrases, and those rules are to be observed unless the resulting construction is inconsistent with the plain meaning of the law. The general rule is that words and phrases shall be construed according to the common meaning of the language. *1 M.R.S.A. § 71, sub-§ 3.*

A lapse of a few days between terms, occasioned by posting and confirmation times, would not constitute an interruption of "consecutive years". This is particularly so where the judge is appointed to succeed himself and the lapse is the result of the mechanics of reappointment. We cannot say at this time what lapse of time would constitute a break in "consecutive years". We prefer to make that judgement when a factual situation is presented.

JOHN W. BENOIT, JR.
Deputy Attorney General

January 6, 1972
Education

Keith L. Crockett, Sec.-Treas.
Maine School Building Authority

Utilization of Alternate Method of Paying School Construction Aid (3460) on Maine School Building Authority Projects.

SYLLABUS:

The "alternate method" of paying State school construction aid to administrative units (20 M.R.S.A. § 3460) is permissible for Maine School Building Authority projects, if authorized by the State Board of Education and if funds are available.

FACTS:

The Maine School Building Authority (hereinafter referred to as Authority) has received several applications from administrative units seeking assistance in the financing of needed school construction. The application received from Lisbon is illustrative of these plural applications and it exemplifies the situation giving rise to your request for an opinion.

The Lisbon application seeks financing assistance on two projects: (1) a high school addition, and (2) construction of a middle school. A data sheet showing preliminary estimations respecting the two projects is attached hereto. Reference will be made only to the high school addition project. the middle school project figures are only cumulative of the factual situation calling for our opinion.

Lisbon's application for construction aid submitted to the Authority indicates that such aid would be due Lisbon on qualifying items totaling $822,500. (Administration costs of $2500 and capitalized interest in the amount of $55,000 are not items which

qualify for construction aid.) Utilizing Table II of 20 M.R.S.A. § 3457, Lisbon is in class 9 and is entitled to 46% State support of construction projects. That means Lisbon would receive State funds totaling $378,350 on the high school addition project. The total cost of the project would be $880,000 (including administration costs and capitalized interest). When the State construction aid funds are subtracted from the $880,000 cost and when local funds of $1650 are also subtracted (for the purpose of 'rounding off' the amount of bonds to be sold by the Authority), the preliminary estimations show that the Authority would need to sell bonds in the amount of $500,000. The preliminary estimation is prepared utilizing the alternate method of paying school construction aid specified in 20 M.R.S.A. § 3460. That section allows the State Board of Education, if funds are available, to pay one-half of the financial assistance due the administrative unit when evidence is submitted that the local officials have contracted or arranged for the construction of the facility, followed thereafter by payment of the balance of State construction aid when proof has been submitted to the Commissioner of Education that the project is completed in accordance with approved plans and a full report of the capital outlay expenditures on the project has been made to the Commissioner. If this "lump sum" alternate method of paying school construction aid is available on Lisbon's application, the amount of bonds to be sold by the Authority will be in the amount of $500,000, but if the alternate method is not available to Lisbon, then the bonds of the Authority must be sold in the amount of $880,000, and Lisbon would receive its State school construction aid on the installment basis. Of course, utilization of the alternate method of paying school construction aid on the project would mean the saving of a considerable sum of money to the State in interest. It is fact that funds are available to the State Board of Education to authorize the alternate method concerning the Lisbon High School project.

QUESTIONS:

1. Whether the State Board of Education can legally authorize the alternate method (3460) of paying school construction aid to Lisbon on the high school addition project made the subject of an application to the Maine School Building Authority?
2. Would Lisbon be entitled to receive its State construction aid under the alternate method of payment of such aid if the high school addition project is financed through the Maine School Building Authority and title to the project is in the Authority until the lease payments are fully made?
3. Whether the Department of Education may legally deposit the State construction aid directly with the trustee bank of the Authority for credit to the Lisbon high school addition project without violating the rights of the Town?

ANSWERS:

1. Yes.
2. Yes, if authorized by the State Board of Education and funds are available.
3. Only if the Town and Trustee agree to such arrangement.

REASONS:

1. Historically, the recipient of financial assistance from the Authority reimburses the Authority over a stated period of years for bonds issued by the Authority to pay for the construction of the project. Section 3457 of Title 20 provides for the filing of reports

by the administrative unit showing the expenditure for capital outlay purposes, including "the amount of rental due the Maine School Building Authority under lease agreement". In the event that an administrative unit is delinquent in any of its lease payments to the Authority, the Department of Education is authorized to make lease payments to the Authority from any amounts of State aid payable to the administrative unit by the Department. *20 M.R.S.A. § 3507.* The question here is whether the so-called "lump sum" alternate method of paying school construction aid (§3460) is legally available concerning projects funded by the Maine School Building Authority. Nothing appears in § 3460 (the alternate method of payment provision) foreclosing use of the alternate method of paying State construction aid respecting projects of the Maine School Building Authority. Neither is there any prohibition to the use of the alternate method in the balance of chapter 501 of Title 20 relating to the State aid in financing of school construction. In the event the Town was delinquent in making a lease payment to the Authority, the withholding provision in 20 M.R.S.A. § 3507 would be available to the Department of Education from "any amounts properly payable to such administrative unit" (subsidy), though the State construction aid be fully paid the unit.

The affirmative answer we give to the first question necessarily involves the second paragraph of § 3460. The language in that paragraph provides that the State Board of Education is not authorized to utilize the alternative method of paying school construction aid "unless funds have then been appropriated in an amount sufficient to meet the total estimated amount of State aid payable on account of the capital outlay project on which such State aid is to be so paid". Thus, it is necessary for the State Board of Education to determine, as a matter of administration, whether funds have been appropriated within the purview of the reference paragraph. It is fact that funds are available.

2. If the State Board of Education authorizes the use of the alternate method of paying school construction aid to Lisbon concerning the high school addition project and funds are available, the lessee Lisbon would be entitled to State construction aid funds in the amount of $378,350 on the high school addition project, even though the Authority would hold legal title to the project until the bonds are completely paid by Lisbon over the period of the lease agreement. Under the installment method of paying school construction aid to administrative units, such aid has been legally paid over the years though title to the project is in the Authority until the lease is fully paid.

3. The third question really amounts to an administrative matter. If the Department of Education enters into a formal understanding with Lisbon respecting the depositing of the State construction aid directly with the trustee bank of the Authority, and if the trustee consents, then that method of bookkeeping would not violate the rights of Lisbon within the purview of the statutes relating to the Authority.

JOHN W. BENOIT, JR.
Deputy Attorney General

LISBON

Years @ 5½% *46% Construction Aid*

PRELIMINARY ESTIMATIONS

	HIGH SCHOOL ADDITION		*MIDDLE SCHOOL*	
ITEM	*M.S.B.A. LEASE*	*APPLICABLE FOR CONSTRUCTION AID*		*APPLICABLE FOR CONSTRUCTION AID*
Construction	$628,115	$628,115	$755,154	$755,154
Site			25,000	25,000
Equipment	76,230	76,230	60,942	60,942
Architect	42,712	42,712	51,500	51,500
Clerk-of-Works			10,000	10,000
Legal	1,000	1,000	1,160	1,160
Insurance	8,000	8,000	8,000	8,000
Adm. Cost	2,500		2,900	
Capitalized Interest	55,000		63,800	
Contingency	66,443	66,443	81,544	81,544
Totals	880,000	822,500	1,060,000	993,300
Local Funds	1,650	x .46	23,082	x .46
State Funds	378,350	378,350	456,918	456,918
Bonds To Be Sold	500,000		580,000	
	Prin. $25,000		Prin. $29,000	
First Annual Payment	Int. 27,500		Int. 31,900	
	$52,500		$60,900	
Total First Payment		$113,400		
Local Assessed Valuation	26,397,445			
Mil Increase Per $1,000	4.3			
State Valuation 1971	16,400,000			
Debt Limitation	1,979,808			
Total Debt to Date	264,615			
12½% State Valuation	2,050,000			
Present N.S.B.A. Debt	109,200			$13,650 Prin. 8 Yrs. to Retire

February 3, 1972
Economic Development

Richard L. Kelso, Director
Lee M. Schepps, Assistant

Attorney General

Use of public credit by municipality to assist private industrial and manufacturing enterprises.

SYLLABUS:

A municipality may, pursuant to certain express constitutional provisions, issue general obligation notes or bonds, to construct buildings for industrial use to be leased or sold to any responsible industrial firm. There is no legislation implementing those constitutional provisions, but none is required because they are self-executing.

FACTS:

Article IX, Section 8-A, provides that for the purpose of assisting in the physical location, settlement and resettlement of industrial and manufacturing enterprises within its physical boundaries, any municipality may, pursuant to a specified vote, authorize the issuance of notes or bonds in the name of the municipality for the purpose of constructing buildings to be leased or sold to any responsible industrial firm or corporation. No legislation has been enacted implementing or elaborating upon the provisions of Article IX, Section 8-A of the Constitution of Maine, particularly as those provisions pertained to general obligation municipal securities.

QUESTIONS:

1. Does a municipality have legal authority to use public funds for the purpose of constructing a building or buildings to be sold or leased to responsible industrial and manufacturing enterprises within its boundaries?
2. Is enabling legislation required in order for a municipality to exercise this authority?

ANSWERS:

1. Yes.
2. No.

REASONING:

For purposes of this opinion, the use of public credit in the form of a general obligation of a municipality, secured only by the municipality's taxing power, and the use of previously assessed and collected tax revenues, are treated as identical. This approach has been adopted by the Supreme Judicial Court in answering similar inquiries. *Opinion of the Justices,* 58 Me. 590 (1871); *Allen v. Inhabitants of Jay,* 60 Me. 124 (1872). No opinion is expressed with respect to whether or not Article IX, Section 8-A of the Constitution of Maine exceeds limits imposed by the United States Constitution. Cf. *Citizens Sav. & L. Asso. v. Topeka,* 20 Wall. (U.S.) 655, 22 L. Ed. 455 (1875).

Maine tax laws, like other Maine laws, have to meet the constitutional requirement that they be for the "benefit of the people". Me. Const. Article IV, pt. 3, § 1 (hereinafter cited as the "Constitution" or by Article and Section). Prior to the adoption of Article IX, Section 8-A, the courts of this State held that the legislature had no authority under the Constitution to pass laws enabling towns, by gifts of money or loan of bonds, to assist individuals or corporations to establish or carry on manufacturing or similar enterprises within the town. *Opinion of the Justices,* 58 Me. 590 (1871). The exceptions carved out of this rule included the use of tax funds for such "public purposes" as maintaining a fuel yard for sale of fuel at cost to inhabitants of a town, building of a city auditorium and promoting agricultural research. *Laughlin v. City of Portland,* 111 Me. 486, 90 A. 318 (1914), affd. 245 U.S. 217 (1917); *Carlisle v. Bangor Recreation Center,* 150 Me. 33, 103 A.2d 339 (1954); *State v. Vahlsing, Inc.* 147 Me. 417, 88 A.2d 144 (1952).

In November, 1962, Article IX, Section 8-A was added to the Constitution, providing as follows:

Section 8-A. For the purposes of fostering, encouraging and assisting the

physical location, settlement and resettlement of industrial and manufacturing enterprises within the physical boundaries of any municipality, the registered voters of that municipality may, by majority vote, authorize the issuance of notes or bonds in the name of the municipality for the purpose of constructing buildings for industrial use, to be leased or sold by the municipality to any responsible industrial firm or corporation.

The above provision expressly permits the issuance of general obligations of a municipality, for the purposes mentioned therein. *Northeast Shoe Co. v. Industrial and Recreational Finance Approval Board,* Me., 223 A.2d 423 (1966). In *Northeast, supra,* the Supreme Judicial Court was faced with, among other things, the issue of whether or not *revenue* obligation securities issued by a municipality pursuant to the provisions of the Municipal Industrial and Recreational Obligations Act (hereinafter cited as the "Obligations Act"), 30 M.R.S.A. §§5325, *et seq.,* are *general* obligation securities within the meaning of Article IX, Sections 8-A and 15. The Court held that *revenue* obligation securities issued under the Obligations Act are not *general* obligations of the municipality within the meaning of Article IX, Section 8-A, and that such *revenue* obligation securities are not debts of the municipality for any constitutional purposes, including the debt limitations specified in Article IX, Section 15. *Northeast, supra,* at p. 425.

The Obligations Act is therefore not an implementation of or enabling legislation under Article IX, Section 8-A. As a matter of fact, it was not intended to be so, as evidenced by 30 M.R.S.A. § 5331.3 which recites that securities issued under the chapter "shall not constitute any debt or liability of the State or any municipality therein . . . . " There is no statute which is an implementation of that constitutional provision. Yet it is clear that Article IX, Section 8-A permits a municipality to use tax funds to assist private industry to an extent not theretofore permitted in Maine.

The issue, therefore, is whether or not Article IX, Section 8-A is self-executing so that municipalities may, without enabling legislation, issue general obligation securities or otherwise use tax funds for the purposes specified therein. The answer is that Article IX, Section 8-A is self-executing and no enabling legislation is necessary to permit municipalities to avail themselves of the rights granted in that section. The modern presumption is that all provisions of a constitution are self-executing. More precisely, a constitutional provision is self-executing when it supplies a sufficient rule by means of which the right which it grants may be enjoyed without the aid of legislative enactment. *Davis v. Burke,* 179 U.S. 399 (1900); *Witman v. National Bank,* 176 U.S. 559 (1899). In other words, a constitutional provision must be regarded as self-executing if the nature and extent of the rights conferred can be determined by an examination and construction of its terms and there is no language indicating that the subject is referred to the Legislature for action. The mere fact that legislation may supplement and add to a self-executing provision of a constitution does not render such a provision ineffective in the absence of such legislation. The conclusion that Article IX, Section 8-A is self-executing seems particularly compelling in this instance where other recent amendments to the Constitution, dealing with powers conferred upon a municipality (Article VIII-A, Municipal Home Rule) and with the use of public credit for industrial and commercial purposes (Article IX, Section 14-A, Increasing Limitation on Authority to Insure Loans to Industry) have made express references to implementation by the Legislature and where Article IX, Section 8-A is silent in this respect. Finally, there is substantial established precedent for the proposition that constitutional authority to

issue municipal debt is self-executing.[1] *State v. Keith,* 179 Okla. 563, 66 P.2d 1059; *Application of City Council of Tahlequah,* 285 P.2d 418; *Ozenne v. Board of Commissioners of Gravity Drainage Dist. No. 1 of Parishes of St. Landry and St. Martin,* 183 La. 465, 164 So. 247; *Harrison v. Roberts,* 264 Ky. 62, 94 S.W.2d 296; *Terry v. Overman,* 194 Ark. 343, 107 S.W.2d 349; *El Dorado v. Jacobs,* 174 Ark. 98, 294 S.W. 411; *City of Middletown v. City Commission of Middletown,* 138 Ohio St. 596, 37 N.E.2d 609.

Of course, there are conditions precedent to the issuance of municipal bonds. The conditions pertain typically to making necessary charter amendments, adopting necessary ordinances and otherwise establishing the authority under which the bonds are issued. These matters are local or municipal in character and can be accomplished by a municipality pursuant to the provisions of Article VIII-A (Home Rule) and the enabling legislation enacted thereunder. 30 M.R.S.A. § 1911, *et seq.* Moreover, such industrial and commercial projects are subject to the equal taxation provisions of Article IX, Section 8 (*Opinion of the Justices,* 161 Me. 182, 210 A.2d 683) and to the debt limitations of Article IX, Section 15. (*Northeast,, supra,* at p. 425). Nevertheless, within certain limitations, municipalities do have the authority to issue general obligation notes or bonds, and thus to use tax funds, to finance industrial and commercial projects in accordance with Article IX, Section 8-A, and that authority needs no implementation by the Legislature in order to be exercised by municipalities.

LEE M. SCHEPPS
Assistant Attorney General

1) A typical example of the rather scant authority which could be cited for a contrary proposition, is the case of *State v. Holman,* (Mo.) 355 S.W.2d 946 which turned upon the wording of the constitutional amendment itself, to the effect that municipalities could construct plants to be leased "*pursuant to law for manufacturing and industrial development*". (Emphasis in the original, *Holman supra,* at p. 950). To the same or similar effect, see *Petition of Monroe City,* (Mo.), 359 S.W.2d 706 and *Pennsylvania Attorney General's Opinion, Municipal Indebtedness,* 42 Pa. Co. 428. There is authority in this State for the proposition that "the provisions of our organic law limiting the power of municipalities to incur indebtedness . . . are not self-executing." *Moores v. Inhabitants of Springfield,* 144 Me. 54, 64, 65 A.2d 569. The case concerned an effort by a municipality to escape liability for an obligation it had incurred allegedly in excess of constitutional limits. The Court's ruling was that the municipality must be held to a strict burden of proof, which it failed to meet in this case, in order to avoid such liability. In other words, the debt limitation provisions were held not to be self-executing for the purpose of relieving a municipality from being held to strict proof in order to escape liability. Further, the municipality sought a constitutional construction which would affect the rights of third parties without meeting such strict proof and, as such, the case essentially represents a rule demonstrating the burden of proof and presumptions applicable in such situations. This is evident from the lengthy annotation prompted by the case and appearing at 16 A.L.R.2d 515, *et seq.* Finally, of course, the constitutional provision in *Moores, supra,* limits the power of, rather than, as here, grants privileges to municipalities.

February 7, 1972
Maine State Police

Lt. Col. Kenneth Wood

Whether buses used by nursery and other pre-school institutions are to be considered "school buses" under Maine law.

SYLLABUS:

Motor vehicles having a carrying capacity of 10 or more passengers and used to convey children to pre-school institutions, both public or private, are school buses and are subject to all safety regulations.

FACTS:

Several inquiries have been addressed to this Office concerning the use of buses by private pre-school institutions. Although some of these schools have been maintaining some minimum safety precautions in transporting children, other schools have not taken even the simplest steps to insure the safety of the young children they transport. The buses concerned are normally of the "mini-bus" variety, designed to carry about 12 passengers.

QUESTION:

Does the use of buses by nursery and other pre-school institutions cause those vehicles to be classified as school buses under Maine law?

ANSWER:

Yes.

EXPLANATION:

"School bus" is defined in 29 M.R.S.A. § 2011 in the following way:

> "§ 2011. School buses; markings, stop at railroad tracks.
>
> The term "school bus" includes every motor vehicle with a carrying capacity of 10 or more passengers, owned by a public or governmental agency or private school and operated for the transportation of children to or from school, or to or from any school activities at a school regularly attended by such children, or privately owned and operated for compensation for the transportation of children to or from school or to or from any school activities at a school regularly attended by such children, or to and from any municipally sponsored, nonschool activity within the State for which use of a bus has been approved by the superintending school committee, community school committees or board of directors; school as used in this sentence shall mean either a private or public school."

We believe that the clear meaning of § 2011 would be that buses used to transport children back and forth from school must comply with the school bus safety regulations denominated under that Title. Obviously, all nursery and pre-school institutions that use

buses to transport their pupils to and from school are involved in "the transportation of children." § 2011 and the other sections concerned with school buses are designed to insure the safety of children while being carried to and from school. The prohibition against passing a loading or unloading school bus, the requirement of a special color for school buses with flashing lights and signs, and all other safety regulations all indicate a state interest in children's safety when they are being transported to school. Although this concern and the use of school buses is most commonly associated with elementary and high schools, transporting children to pre-school institutions is just as great, if not greater in importance to the state because of the young age of pre-school children. It would be inconsistent with a state policy reflected in this statute to afford protection to elementary and high school students, and not to protect the younger, more vulnerable children who attend nursery schools.

The statute's breadth of application is also indicated by the fact that it is to cover both private and public schools. Thus a pre-school institution, whether privately run or government-sponsored, would be covered by the school bus safety regulations.

On the basis of the above, all pre-school institutions involved in transporting children to and from their institutions when using a motor vehicle with a capacity of 10 or more must comply with the safety regulations ot Title 29, § 2011 et seq.

JOHN R. ATWOOD
Assistant Attorney General

February 15, 1972
Aeronautics

Linwood Wright, Director

Licensing; Air-Taxi Service

SYLLABUS:

1. Aircraft used by a Maine air-taxi operation in interstate commerce are exempt from the registration provisions in 6 M.R.S.A. § 14.

2. Funds which the Legislature allocated for us in land acquisition, clearing of runway approach areas and construction of runway extensions, cannot be legally used for rehabilitation (repairs) of existing portions of runways.

FACTS:

Situation No. 1: An air-taxi service is provided between Rockland, Maine and Boston, Massachusetts. The service is provided in aircraft leased from an out-of-state firm by the Maine firm.

Situation No. 2: The provisions of P & S Laws 1967, c. 178 authorized a general fund bond issue for construction, extension and improvements for airports. Moneys were allocated for the Auburn-Lewiston airport to: "Acquire land, clear approaches, extend runway 17-35" and for installation of a localizer. *Id., section 6.* Repairs are deemed necessary respecting present portions of runway 17-35.

QUESTIONS:

1. Is the air-taxi operator required to register the aircraft in situation No. 1?

2. Can the moneys allocated in situation No. 2 be used to repair present portions of runway 17-35?

ANSWERS:

1. No.
2. No.

REASONS:

Situation No. 1: Section 14 of Title 6 of the Revised Statutes states, in part, that:

> " * * * . All nonresident aircraft owners engaged in air commerce *within the State* shall register such aircraft with the director and pay a fee of $35 for each registration." *6 M.R.S.A. § 14, sub-§1.* (Emphasis mine.)

The reference section also specifies exemptions from registration of aircraft (and individuals), one of which exemptions is as follows:

> "D. An aircraft engaged principally in commercial flying constituting an act of interstate or foreign commerce." *6 M.R.S.A. § 14, sub-§2, para. D.*

The aircraft made the subject of your memorandum are being used in interstate commerce between a point in Maine and a point in Massachusetts. Thus, the exemption noted above applies. No ambiguity exists between the registration requirements and the reference exemption for the reason that the subject air commerce is not "within the State"; but on the contrary occurs in "interstate commerce." Words, "within the state", must be construed to mean from one point in the state to another point in the state. *Commonwealth v. Chesapeake & Ohio Ry. Co.,* 251 Ky. 382, 65 S.W.2d 95 (statute prohibited common carriers from issuing free passes for transportation of passengers within the state). In *State v. Pullman Palace Car Co.,* 64 Wis. 89, 23 N.W. 871, it was decided that the words, "within the state", in a statute authorizing the taxation of the gross earnings of a railroad company in the use of certain cars between points within the state, didn't describe the act of going from a point in the state to a point outside the state nor from a point outside to a point inside the state. Interstate commerce is not business done "within the state". *Pacific Exp. Co. v. Seibert,* 44 F. 310. Addition of intensifying words like "wholly" and "entirely" do not alter the reference phrase; words, "within the state", mean done entirely within the boundaries of the state. *Western Union Tel. Co. v. City of Freemont,* 39 Neb. 692, 58 N.W. 415.

Situation No. 2: The question here is whether the words, "acquire land, clear approaches, extend runway 17-35", embrace repairing of runway 17-35 now existing. Apparently they don't. The Act uses the words; "repaving runway", respecting the Millinocket airport; "resurfacing runway", regarding the Houlton runway; "rehabilitate apron", of the Bangor airport; and "rehabilitate, pave runway", at Rangeley airport. If the Legislature had intended to allow use of Auburn-Lewiston Airport funds to rehabilitate runway 17-35, it should have said so.

> "We are ascertaining here not what the Legislature may have meant by what it said, but rather are deciding what that which the Legislature said means." *State v. Millett,* 160 Me. 357, 360.

Significantly, although the Legislature stated that the *amounts* listed after each unit in section 6 of the Act are to be construed as guides, no such guidance (permitting exercise of discretion) appears in the Act respecting the stated *purposes* for which the funds are to be used.

JOHN W. BENOIT, JR.
Deputy Attorney General

February 24, 1972
Education

Asa A. Gordon, Asst. Commissioner

Request for State School Construction Aid Required to Service School Building Lot

SYLLABUS:

An administrative unit's cost of extending water and sewer lines to the boundary of a school lot, from points located some distance from the school lot, along accepted city streets, do not qualify for State school construction aid under 20 M.R.S.A. § 2356-B, incorporating the provisions of 20 M.R.S.A. § 3457 to § 3459.

FACTS:

A city has selected a site for the construction of a regional technical and vocational center at the secondary level. *20 M.R.S.A. § 2356-A to § 2356-H.** In order that the site be utilized for such purpose, it is necessary to extend water and sewer lines to the site, from points located some distance from the proposed school lot, along accepted city streets. The sewer line will be extended 200 feet at a cost to the city of $2,000. The water line will be extended 3200 feet at a cost to the city of $36,000. The moneys so expended by the city on behalf of the board of education will involve contracts entered into with the two quasi-municipal corporations concerned with extensions of the two lines. The city is like any other customer asking that sewer and water lines be extended; the cost falls upon the customer being provided with the reference services.

City officials ask that State school construction aid be paid the municipality because if the municipality were to drill a well on the school lot in order to obtain water to be used for school purposes, and if the municipality were to establish sewer treatment facilities on the site for school purposes, the State would pay school construction aid. Also, municipal officials have suggested that if school construction aid was paid by the State for the extension of the two lines, any rebates paid the city by reason of other persons connecting to the water and sewer lines so extended would be proportioned back to the State.

QUESTION:

Whether the costs to the city of extending water and sewer lines to the boundary of the selected school lot, from points located some distance from the site, along accepted city streets, would quality for State school construction aid under 20 M.R.S.A. § 2356-B incorporating the provisions of 20 M.R.S.A. § 3457 to § 3459?

ANSWER:

No.

* The provisions of 20 M.R.S.A. § 2356-B relating to construction aid incorporate by reference the provisions of 20 M.R.S.A. § 3457 to § 3459.

REASONS:

The analogy cited by city officials in support of the request for State school construction aid is correct to the extent of the recital that a drilled well or sewer treatment facility *on the site* would qualify for school construction aid. *Schofield v. School District No. 113, Labette County,* 105 Kan. 343, 184 P. 480. In that case, the word "appendage" used in a state statute authorizing a district school board to provide the necessary "appendage" for the schoolhouse included a well *on the school premises.* Also see to the same effect *Hemme v. School District No. 4,* 30 Kan. 377, 1 P. 104, and *In re Bozeman,* 42 Kan. 451, 22 P. 628. The reference offered analogy concludes that State school construction aid should be paid on the extension lines brought to the school building lot because it is a situation not substantially different from digging an artesian well on the school lot. We cannot concur in that conclusion. Whereas in one case the drilled well and sewer treatment facilities would be wholly within the confines of the school site, in the other instance, offsite facilities are involved; in one case (the water line) to the extent of 3200 feet. Also, water and sewer facilities located entirely on the school lot are part and parcel of the school property whereas offsite extension lines cease to be an "appendage" of the school site at the lot boundary line. *Doughton v. City of Camden,* 72 N.J.L. 451, 63 A. 170. In that case, a water pipe under a road bed of a public street laid for the distribution of water for the use of a city and of its inhabitants was considered not to be an "appendage" to or a part of the adjoining lot. The distinguishing factors existing between *on site* and *offsite* construction expenses are material and bring about a different result respecting requested State school construction aid. Otherwise, where is the line to be drawn regarding eligibility of offsite expenses? Since the water line will be extended 3200 feet, payment of State subsidy for its construction would lend credence to the position that no line is to be drawn at all. This opinion draws the line at the property line of the school lot. Otherwise, State school construction funds would be utilized to subsidize construction of municipal facilities off the schoolhouse lot; facilities available to private property owners (at a cost, to be sure) abutting the length of the extended lines along the public way. The aspect of rebates to the State of a proportion of expended State aid only serves to point out that the expenditure, if made in the first instance, was involved in funding something not completely related to school costs.

The provisions of 20 M.R.S.A. § 3457 authorize the Commissioner of Education to appropriate moneys to administrative units for eligible capital outlay purposes. The phrase (capital outlay purposes) means, among other things, the cost of new construction of a public school building. Nothing appears in the reference section allowing us to interpret eligibility for State school construction aid on the basis of offsite costs such as those involved here.

JOHN W. BENOIT, JR.
Deputy Attorney General

February 24, 1972
Maine Land Use Regulation Comm.

James Haskell, Director

The Shoreland Zoning Law and The Maine Land Use Regulations Law.

SYLLABUS:

12 M.R.S.A. § 685-A.5 (P.L. 1971, c. 457 § 5) in no way limits the responsibility of the Maine Land Use Regulation Commission to act together with the Maine

Environmental Improvement Commission after consultation with the State Planning Office to adopt land use ordinances, under certain circumstances, for all land areas within 250 feet of the normal high water mark of any navigable fresh or salt water body.

FACTS:

12 M.R.S.A. § 685-A.5 (P.L. 1971, c. 457 § 5) provides:

"Land use guidance standards adopted by the Maine Land Use Regulation Commission pursuant to this chapter for management districts shall in no way limit the right, method or manner of cutting or removing timber or crops, the construction and maintenance of hauling roads, the operation of machinery or the erection of buildings and other structures used primarily for agricultural or commercial forest product purposes, including tree farms."

12 M.R.S.A. § 4811 (P.L. 1971, c. 535) provides:

"To aid in the fulfillment of the State's role as trustee of its navigable waters and to promote the public health, safety and the general welfare, it is declared to be in the public interest that shoreland areas defined as those land areas any part of which are within 250 feet of the normal high water mark of any navigable pond, lake, river or salt water body be subjected to zoning and subdivision controls. The purposes of such controls shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish, aquatic life, bird and other wildlife habitat; control building sites, placement of structures and land uses; and conserve shore cover, visual as well as actual points of access to inland and coastal waters and natural beauty."

12 M.R.S.A. § 4813 (P.L. 1971, c. 535) provides in part:

"If any municipality fails to adopt zoning and subdivision control ordinances for shoreland areas . . . the Environmental Improvement Commission and the Maine Land Use Regulation Commission shall, following consultation with the State Planning Office . . . adopt suitable ordinances for these municipalities . . . . "

QUESTION:

Is the power of the Maine Land Use Regulation Commission and the Environmental Improvement Commission, after consultation with the State Planning Office, to adopt land use ordinances for "shoreland areas" in areas classified by the Maine Land Use Regulation Commission as falling within the "management districts" in any way limited by the provisions of 12 M.R.S.A. § 685-A.5 which limits the Maine Land Use Regulation Commission's power to adopt land use guidance standards for agricultural or commercial forest product activities in management districts?

ANSWER:

No.

REASONING:

12 M.R.S.A. § 685-A.5 limits the power of the Maine Land Use Regulation Commission to adopt land use guidance standards "pursuant to this chapter" (Chapter 206-A) in management districts by prohibiting the Commission from in any way limiting certain activities of agricultural and commercial forest product industries.

12 M.R.S.A. § § 4811-4814 (Chapter 424) on the other hand permits and indeed requires the Maine Land Use Regulation Commission together with the Environmental Improvement Commission, after consultation with the State Planning Office, to adopt ordinances to "prevent and control water pollution; protect spawning grounds, fish, aquatic life, bird and other wildlife habitat; control building sites, placement of structures and land uses; conserve shore cover, visual as well as actual points of access to inland and coastal waters and natural beauty".

It is apparent that the Legislature in 12 M.R.S.A. § § 4811-4814 has chosen to deal specially with Shoreland Areas despite other applicable state laws and regulations. It is further apparent that the limitations upon the Maine Land Use Regulation Commission's power in Management Districts as to regulating agricultural and forest product activities is only with regard to "land use guidance standards" adopted pursuant to Chapter 206-A of Title 12 of M.R.S.A.

Ordinances for Shoreland Areas, adopted by the Maine Land Use Regulation Commission, together with the Environmental Improvement Commission, after consultation with the State Planning Office, must not only be consistent with the purposes of 12 M.R.S.A. § § 4811-4814, but must be in furtherance of these purposes. If, in the judgment of the two Commissions, ordinances controlling agricultural or forest product activities are necessary to carry out the purposes of 12 M.R.S.A. § § 4811-4814, then it is their joint duty to enact such ordinances. While the Maine Land Use Regulation Commission may not adopt these ordinances under the guise of "land use guidance standards" in "management districts", there is no reason that reference to such ordinances may not be made in the Maine Land Use Regulation Commission Regulations. It should be noted, however, that enforcement of such ordinances will require joint action by the Maine Land Use Regulation Commission and the Environmental Improvement Commission.

E. STEPHEN MURRAY
Assistant Attorney General

March 3, 1972
Education

Asa A. Gordon, Assistant Commissioner

Requirements for approval of private schools for attendance, tuition and State subsidy purposes

SYLLABUS NO. 1:

State subsidy may not be paid to an administrative unit which sends pupils to a private school which does not employ certified teachers and does not maintain a school year of 175 actual school days.

SYLLABUS NO. 2:

The Commissioner of Education may not approve:

(A) Private schools which do not employ all certified teachers and which do not maintain a school year of at least 175 actual school days, and

(B) Private schools which operate the required 175 actual school days per year, but do not employ all certified teachers.

SYLLABUS NO. 3:

When the parents of pupils pay the tuition for their attendance at a school which does not operate 175 actual school days per year, the school committee, the board of directors or the superintendent of schools in the town where such pupils reside may not excuse their absence from the town schools pursuant to 20 M.R.S.A. § 911.

FACTS:

There are some 50 towns in the State of Maine which operate no schools and, of necessity, send their children to either private or public schools at town expense. The State subsidizes these towns for each student sent out at public expense whether they go to public or private schools.

Some parents in various towns and administrative units throughout the State choose to send their children to private schools at their own expense. Title 20 M.R.S.A. § 911 permits these students to be excused from public school attendance, if the child obtains equivalent instruction for a like period of time in a private school approved by the Commissioner of Education.

The following questions have been raised in connection with these facts:

QUESTION NO. 1:

May State subsidy aid be paid to an administrative unit which sends pupils to a private school which does not employ certified teachers and does not maintain a school year of 175 actual school days?

QUESTION NO. 2:

May the Commissioner of Education approve: (A) private schools which do not employ all certified teachers and which do not maintain a school year of at least 175 actual school days, and (B) private schools which operate the required 175 actual school days per year, but do not employ all certified teachers?

QUESTION NO. 3:

When the parents of pupils pay the tuition for their attendance at a school which does not operate 175 actual school days per year, may the school committee, the board of directors or the superintendent of schools in the town where such pupils reside excuse their absence from the town schools pursuant to 20 M.R.S.A. § 911?

ANSWERS:

No. 1. No.
No. 2(A) No.
(B) No.
No. 3. No.

REASONS (NO. 1):

The last sentence of 20 M.R.S.A. § 1289, as amended by P.L. 1971, chapter 530,

section 18, provides in part that,

> " . . . the expenditure of any administrative unit for schooling of pupils as provided in this section *shall be subject to the conditions of 1291 and 1292 for the purposes of state subsidy to the administrative unit."* (Emphasis supplied.)

One of the "conditions of sections 1291 and 1292" is that, in a situation where a town does not operate any schools, the pupils from that town must attend "an approved secondary school." Furthermore, section 3452, subsection 5 provides that an academy whose trustees have contracted with a town for the education of that town's pupils pursuant to section 1289 is considered to be a "secondary school." It would, therefore, appear that, in order for an administrative unit to be eligible for State subsidy aid toward the cost of sending its pupils to a private school or academy, such private school or academy must be "an approved secondary school." It also appears from section 1344 that an academy may provide approved secondary education under the conditions of sections 1291 and 1292,

> "when in the judgment of the commissioner from the returns made as provided, it appears that any incorporated academy in the State is prepared to give *instruction equivalent to that required by law to be given in free high schools,* that pupils attending said academy are qualified to receive such instruction and that *the teachers in said academy are certified or licensed to give instruction in secondary school studies . . . "* (Emphasis supplied).

Finally, with respect to the instructional requirements of State law for all secondary schools, section 1281 provides, in part, that,

> "No school shall be given basic approval for attendance, tuition or *subsidy* purposes within this Title unless it meets the following requirements:
>
> "3. Minimum school year. It has a minimum school year of 180 school days of which *not less than 175* shall be *actual school days . . . "*
>
> "4. Certified teachers. It employs *only certified teachers."* (Emphasis supplied).

When the statutory provisions which have been cited and quoted above are read together, they require, as prerequisites to the payment of state subsidy aid to an administrative unit which sends its pupils to a private school or academy, that such school or academy maintain a minimum school year of not less than 175 actual school days and employ only certified and licensed teachers.

REASONS (NO. 2(A) and (B)):

As already discussed in connection with Question No. 1, a private academy or school whose trustees have contracted with a town for the education of that town's pupils, pursuant to section 1289, is considered to be a "secondary school" under section 3452, subsection 5. Furthermore, under sections 1344 and 1281, no school may be given basic approval for attendance, tuition or subsidy purposes within Title 20 unless, among other things, it maintains a minimum school year of not less than 175 actual school days and employs only certified teachers.

I do note, however, that in your second question you did not state for what purpose the commissioner would give his approval. Therefore, it should be noted that, under the second paragraph of subsection 10 of section 1281, if it is possible for a private school or academy to be accredited by the New England Association of Colleges and Secondary Schools without it employing all certified teachers or without it maintaining a school year of at least 175 actual school days, then "notwithstanding any other provision of Title 20," the Commissioner of Education *must* give basic approval *for the purposes of*

attendance to any nonpublic secondary school and *for the purposes of tuition* to any nonpublic secondary *boarding* school which is so accredited.

REASONS (NO. 3):

Section 911 of Title 20 provides, in part, that,

> "necessary absence may be excused by the superintending school committee, school directors or superintendent of schools or teachers acting by the direction of either. Such attendance shall not be required if the child obtains equivalent instruction, *for a like period of time,* in a private school in which the course of study and methods of instruction have been approved by the commissioner . . . " (Emphasis supplied)

As previously noted in connection with both Questions 1 and 2, section 1281 of Title 20 requires that all schools approved for attendance, tuition or subsidy purposes must maintain a minimum school year of 180 school days, of which not less than 175 shall be actual school days. Assuming that the public schools which these pupils would attend, but for their parents sending them elsewhere, would all be approved schools under the provisions of section 1281, this opinion is based upon the reasoning that the above-emphasized phrase, *"like period of time",* in section 911, means a period of time which is at least equal to the 175 actual school days per school year which is required for basic approval under section 1281. Therefore, in order for pupils to be excused under section 911 from attendance at their local public schools, they must attend a school which, among other things, maintains a school year of not less than 175 actual school days.

CRAIG H. NELSON
Assistant Attorney General

March 24, 1972

James C. Schoenthaler, Chairman

Your Memo of March 23, 1972, Requesting Legal Opinion

SYLLABUS:

Maine Employment Security Commission may make an increase in contribution rates effective for the calendar quarter in which it finds an emergency exists such as to seriously impair the unemployment compensation fund, and in which it imposes the increase after reasonable notice and public hearing on the matter, as provided in Section 1221, subsection 4, paragraph C of the Maine Employment Security Law (T. 26, Chapter 13, M.R.S.A. 1964, as amended). For such action to be authorized during calendar year 1972, the amount in the unemployment compensation fund must be under $15,000,000.

FACTS:

"Contributions" means the money payments to the State Unemployment Compensation Fund required by the Maine Employment Security Law (Section 1043, subsection 8).

Section 1221, subsection 1, paragraph A of the law provides that contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter, and that such contributions shall become due and be paid in accordance with such regulations as the Commission may prescribe.

Commission Regulation 4, section 1, paragraph A provides that contributions shall be due and shall be paid on or before the last day of the month following the close of the calendar quarter for which the contributions have accrued.

Commission Regulation 4, section 1, paragraph B provides that each quarterly payment shall include contributions with respect to wages for employment paid within the calendar quarter.

Section 1221, subsection 2 contains provisions relative to the percentage of taxable wages to be paid, except as prescribed in subsection 4.

Section 1221, subsection 4, paragraph B contains a chart from which an employer's contribution rate is determined, based on his experience rating record as determined in the same paragraph, which contribution rate varies with the amount of money in the Unemployment Compensation Fund, as set forth in the chart under columns lettered A to F inclusive. By virtue of a specific provision in said paragraph B, the contribution rates presently in effect are those contained in Column F.

Paragraph C of the same subsection reads as follows:

> "C. If at any time, from January 1, 1972 to December 31, 1972, the net balance available for benefit payments equals or is less than $15,000,000, or from January 1, 1973 to December 31, 1973 the net balance available for benefit payments equals or is less than $17,500,000, or on and after January 1, 1974 the net balance available for benefit payments equals or is less than $20,000,000; and, in the opinion of the commission, an emergency exists such as to seriously impair the fund, the commission may, after reasonable notices and public hearing, *forthwith impose* the rates shown in column F of the schedule carried in paragraph B and, in addition thereto, increase such rates by not more than .5% and continue said rates, and additions thereto, in force until, in the opinion of the commission, such emergency no longer exists, or until the date set by this chapter for the computation of rates, whichever is earlier." (emphasis supplied).

On the date this opinion is being written, the unemployment compensation fund is under $15,000,000.

QUESTION:

Your memorandum of March 23, 1972, asks the following question:

> "Under the circumstances and for the periods set forth in Section 1221,4,C of the Employment Security Law the Commission has authority to increase contribution rates. Would this authority allow such an increase in rates to be effective for the first quarter of 1972? In addition, would this authority allow such an increase in rates to be retroactive to January 1, 1972, if implemented in the second, third, or fourth quarter?"

ANSWER:

We break the question into two parts, and we answer each part:

1. Would the authority allow an increase effective for the first quarter of 1972?

Answer: Yes, within limitations expressed in the following section headed *Reasons.*

2. Would the authority allow an increase, retroactive to January 1, 1972, if

implemented in the second, third, or fourth quarter?

Answer: No.

REASONS:

Inasmuch as the rates set up in column F, previously referred to, are already in effect, the only action open to the Commission would be to increase those rates up to .5% if in its opinion an emergency exists such as to seriously impair the Unemployment Compensation Fund.

Obviously, the purpose of the provision for imposing such an increase is to prevent endangering the status of that fund and it should be construed so as to best accomplish that purpose. The statute states that after public hearing the Commission may *forthwith impose* the increase in rates under discussion.

BLACK'S LAW DICTIONARY, Revised Fourth Edition, defines *forthwith:*

> "Forthwith. Immediately; without delay, directly, hence within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch . . . Within such time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed or accomplished."

Under Commission regulations, computation of contributions due is on wages paid during a calendar quarter. Such computation must be on the basis of the rate applicable to the quarter involved.

It is our opinion that if, during the current calendar quarter, the Commission is of the opinion that an emergency exists such as to seriously impair the fund, it may – within the current calendar quarter – after reasonable notices and public hearing, impose up to .5% increase in the rates shown in aforesaid column F, to be effective for the calendar quarter ended March 31, 1972.

In view of the limitations stated in our opinion relative to the current calendar quarter, it follows that it is our opinion that action under Section 1221, subsection 4, paragraph C resulting in increases in rates up to .5% can be made effective no earlier than for the quarter in which all necessary action has been taken.

FRANK A FARRINGTON, Assistant Attorney General
MERRILL A. TRACEY, Assistant Attorney General

April 7, 1972
Education

Asa A. Gordon, Asst. Comm. School Adm. Serv.

Computation of General Purpose Aid

SYLLABUS:

A corrected and final biennial computation of general purpose aid under Title 20, M.R.S.A. § 3732, must be based upon the certified state valuation for the same ensuing biennium which the State Tax Assessor is required by Title 36, M.R.S.A. § 381 to file before the first day of February of each regular legislative session.

FACTS:

The budget for paying State school subsidies, pursuant to Title 20, M.R.S.A. § 3732, is prepared by the Commissioner of Education based upon State valuations that exist during the summer in the year preceding the convening of each Legislature. In the past corrections were made, pursuant to the provisions of section 3732, in the computation of these school subsidies after the final biennial State Valuation was filed. This filing was required by Title 36, M.R.S.A. § 381 to take place on or before each December 1st preceding the convening of the Legislature. Section 381 of Title 36 was amended by the Public Laws of 1969, chapter 502, section 4, so that the final State valuation has to be filed "as soon as completed and before the first day of February of the regular sessions of the Legislature." Therefore, it is no longer certain that the biennial computation of the State school subsidy can be corrected and thereby finalized prior to the convening of each regular session of the legislature.

QUESTION:

In view of the fact that the biennial State Valuation is no longer required to be finalized and filed prior to the convening of the Legislature, is the Commissioner of Education required to submit a budget for paying State school subsidies, under Title 20, section 3732, based upon the State Valuation that was certified and filed during the regular Legislative session next preceding the session which will consider said budget?

ANSWER:

No.

REASONS:

As already noted, section 381 of Title 36 was amended by section 4 of chapter 502 of the Public Laws of 1969 so as to change the final date for filing the biennial State Valuation from each December 1st preceding the regular session of the Legislature to "the first day of February of the regular sessions of the Legislature." It appears that the only reason for this change was to give the Municipal Valuation Appeals Board, which was created by section 3 of chapter 502 of the Public Laws of 1969, sufficient time to hear and decide any appeals that might be filed with it by municipalities deeming themselves "aggrieved by the State Valuation." Under the provisions of section 292 of Title 36, the Municipal Valuation Appeals Board must render its decisions on or before January 15th (of the regular sessions of the Legislature). Therefore, there does not seem to be any evidence that the Legislature, in making the above-described amendment to section 381 of Title 36, intended to change the basis of the biennial computation of general purpose aid under section 3732 of Title 20.

Furthermore, when the pertinent provisions of Title 36, M.R.S.A. §§ 208, 292 and 381 and Title 20 M.R.S.A. § 3732 are read together, they indicate an overall intent on the part of the Legislature that a *biennial* computation of general purpose aid under section 3732 of Title 20 should be based, in its final corrected form, upon the certified State valuation *for the same ensuing biennium* which the State Tax Assessor is now required by section 381 of Title 36 to file, "as soon as completed, and before the first day of February of the regular sessions of the Legislature." This construction is also required in order to maintain the biennial structure of the State's budget and finances.

The Commissioner of Education would, therefore, have to initially submit the portion of his Department's biennial budget which deals with the computed general purpose aid under section 3732 on a tentative basis. Any changes in the general purpose aid computation which might be required by adjustments made in the biennial State Valuations by the Municipal Valuation Appeals Board, pursuant to Title 36, M.R.S.A. §§ 208 and 292, would then have to be brought to the attention of the Joint Legislative Committee on Appropriations and Financial Affairs after the State Tax Assessor has certified and filed the valuations pursuant to section 381 of Title 36.

CRAIG H. NELSON
Assistant Attorney General

April 7, 1972
Commission of Pharmacy

Richard O. Campbell, Secretary

Pharmacy – Hospitals

SYLLABUS:

A hospital does not need an apothecary business license in order to dispense drugs to its bona fide outpatients. A hospital employee is not per se an outpatient of that hospital. Non-licensed personnel of a hospital pharmacy may not dispense drugs.

FACTS:

Stated in the questions.

QUESTIONS:

1. Does Maine Law require licensure for an institution to dispense Legend and/or Controlled Drugs to outpatients?
2. Are employees of this institution considered by Maine Law as the equivalent of outpatients in regards to dispensing of these substances (g.v.)?
3. Can non-licensed pharmacy personnel dispense to these employees, or must they be dispensed by a duly licensed Pharmacist?

ANSWERS:

1. No.
2. No. But see "Reasons."
3. No; Yes.

REASONS:

Your first question is construed to be: whether or not a hospital must obtain an apothecary business license in order to dispense drugs to its bona fide outpatients. The answer to that question is negative for the following reasons. 32 M.R.S.A. § 2801 provides:

"No person shall within the limits of this State conduct the business of an

apothecary or any part thereof . . . . unless the same is placed and kept under the personal control and supervision of a registered apothecary . . .

"This section shall not apply to physicians, hospitals and sanatoriums who supply medicines to their bona fide patients, . . . "

It is clear that a hospital needs no apothecary business license to dispense drugs to its "patients." The critical question is: what is a "patient" within the meaning of 32 M.R.S.A. § 2801? Chapter 41 of Title 32 provides no definition of that term. In the absence of a statutory definition of that term, we must construe the word "patient" in accordance with "the common meaning of the language." *1 M.R.S.A. § 72, subsection 3. Webster's New International Dictionary, Second Edition,* Unabridged, defines "patient" as:

"Patient – A sick person, now commonly, one under treatment or care, as by a physician or surgeon, or in a hospital; hence, a client of a physician, hospital or the like."

Webster's Seventh New Collegiate Dictionary defines "patient" as:

"Patient: An individual awaiting or under medical care and treatment."

It seems clear from these definitions that a bona fide outpatient would be a client of a hospital and a person under medical treatment of a hospital, and, hence, a "patient" within the meaning of 32 M.R.S.A. § 2801.

Your second question is somewhat ambiguous. We have construed it to ask: whether or not an employee is, by mere force of his relationship as an employee, necessarily an "outpatient" of the hospital employing him? If that is the intent of question 2, the answer must be in the negative, since a "patient" and an "employee" constitute two distinctly different relationships. One is at the hospital for work and the other is there for medical treatment. While it is clearly possible for an employee to become sick and to seek and obtain medical care from that hospital, and, *thereby,* to become also a "patient" of the hospital, it is equally clear that a lot more is required to establish a bona fide status of "patient," including "outpatient," than merely the establishment of the status of "employee."

Your third question is construed to ask: whether or not non-licensed pharmacy personnel, of a hospital pharmacy which does not have an apothecary business license, may dispense to employees of a hospital who are not bona fide "patients," including, "outpatients," of that hospital? The answer to that question is negative for two reasons. The first reason has already been indicated in the explanation of the answer to the second question. A hospital that does not have an apothecary business license can only dispense drugs to its bona fide "patients," including "outpatients", and, as above-explained, an "employee" is not per se a "patient," including "outpatient." The second reason for the negative answer to the third question is that while a hospital is exempt from the requirement of an apothecary business license, its personnel are not excluded from the requirement of 32 M.R.S.A. § 2902, which requires that every person who practices pharmacy must be licensed.

A similar opinion relating to similar questions was expressed in a letter dated January 31, 1963, to Mr. Edward L. Allen, Secretary of the Commission of Pharmacy, by Leon V. Walker, Jr., Assistant Attorney General.

CHARLES R. LAROUCHE
Assistant Attorney General

April 7, 1972
Maine State Retirement System

William Blodgett, Ass't. Executive Director

Retirement – Purchase of Back Time.

SYLLABUS:

A former State employee who withdrew his membership contributions from the State Retirement System, and thereafter rejoined that system as an employee of a participating local district, is not entitled to obtain a transfer of his prior membership credit to his new membership account by tendering the former contributions plus interest.

FACTS:

Subject individual was employed by the State Department of Health and Welfare on June 27, 1949, joined the State Retirement System on January 2, 1950, separated from the State employment on June 23, 1951, applied for refund of his contributions to the State Retirement System on January 9, 1952, and received same on January 28, 1952. On November 2, 1963, he was employed by the Kennebec Water District, became a member of the State Retirement System and so continues to the present time. He now tenders to the State Retirement System a check in the amount of $573.50, which represents his contributions, plus interest, for the period that he was a State employee in the Health and Welfare Department, with a request that credit for such period of membership as a former State employee be transferred to his present membership account as an employee of the participating local district, i.e., Kennebec Water District.

QUESTION:

Can a former State employee who requested and received a refund of his contributions to the State Retirement System while such an employee, and who subsequently becomes a member of that System while an employee of a participating local district, purchase a transfer of credit for the former membership to be added to his present membership account by tendering back his contributions plus interest for the former period?

ANSWER:

No.

REASONS:

5 M.R.S.A. § 1094, subsection 8, provides that a member –

" . . . may if he so elects, pay into the Members' Contribution Fund any or all back contributions covering any or all of the period from July 1, 1942, to the date when such member first began to make contributions to the retirement system and receive therefor the proper membership credit for the period for which such back contributions are made."

This provision would seem to authorize the subject individual to pay into the System at least any unpaid back contributions for the period June 27, 1949, when he first became a State employee, to January 2, 1950, when he first became a member of the System.

5 M.R.S.A. §1094, subsection 10, provides:

> "10. Former Members. Any former member who withdrew his contributions after termination of service may, upon later restoration to membership and prior to the date any retirement allowance becomes effective for him, deposit in the Members' Contribution Fund by a single payment or by an increased rate of contribution an amount equal to the accumulated contributions withdrawn by him together with regular interest thereon from the date of withdrawal to the date the deposit payment or payments are made. Upon the completion of such deposit the member shall be entitled to all creditable service that he acquired during his previous membership . . . . "

This provision would seem to authorize the subject individual to pay back into the System his withdrawn contributions and thereby to obtain a credit for such prior membership.

However, 5 M.R.S.A. §1092, subsection 9, provides:

> "Notwithstanding anything to the contrary, the retirement system shall not be liable for the payment of any benefits on account of the employees or pensioners of any participating local district for which reserves have not been previously created from funds contributed by such participating local district, or its employees for such benefits."

This provision appears to be couched in the terms of an overriding limitation upon the obligation of the System to pay benefits to employees of a participating local district. Benefits are not payable unless *reserves* have "been previously created from funds contributed by such local district, or its employees for such benefits." Nevertheless, 5 M.R.S.A. §1092, subsection 11, states that:

> "Any member of the retirement system whose service is terminated as an employee, either as defined in section 1001 or as an employee of a participating local district, shall, upon subsequent re-employment as such an employee but with a new employer, provided he shall not have previously withdrawn his accumulated contributions, thereupon have his membership transferred to his account with his new employer, and shall be entitled to all creditable service resulting from his previous employment."

Thus, subsection 11 of 5 M.R.S.A. §1092 grants to a former member who becomes re-employed with a new employer the right to obtain a transfer of his former membership to his new membership account. This would require his former employer (in this case, the State) to transfer to his new employer (in this case, the Kennebec Water District)

> "All funds in the retirement system contributed by his former employer on account of his previous employment . . . to liquidate the liability incurred by reason of such previous employment." subsection 11, Id.

However, the right to obtain credit for the former membership is expressly conditioned by that subsection upon the requirement that – "he shall not have previously withdrawn his accumulated contributions – ."

Since subsection 11 of 5 M.R.S.A. §1092 deals definitively with the situation of re-employment with a *different* employer, it thus becomes clear that subsections 8 and 10 of 5 M.R.S.A. § 1094 deal with the situation of employment with the *same* employer. This construction seems to be required to avoid rendering meaningless the

express proviso in 5 M.R.S.A. § 1092, subsection 11.

It is apparent from Chapter 101 of Title 5 of the Revised Statutes that employment in several different departments of the State of Maine constitutes employment with the *same* employer. It is equally apparent that employment by a local participating district constitutes employment by a new employer vis-a-vis the State.

Accordingly, since subject individual withdrew his contributions for membership in the System after termination of his employment with the State, he cannot upon his re-employment by a *new* employer, i.e., the participating local district, obtain a transfer of his former membership credit to his new membership account.

CHARLES R. LAROUCHE
Assistant Attorney General

April 11, 1972
Education

Asa A. Gordon, Asst. Comm. Sch. Adm. Serv.

Cooperative Agreements under Title 20 M.R.S.A. § 309

SYLLABUS:

A cooperative agreement under the provisions of Title 20 M.R.S.A. § 309 may not be utilized to carry out, as a specified educational function, the construction and operation of a school.

FACTS:

Chapter 276 of the Public Laws of 1971 authorized municipalities to enter into cooperative agreements for carrying out "specified educational functions." Under the provisions of section 309, which was added to Title 20 along with sections 309-A and 309-B by chapter 276, the State Board of Education is required to prepare a cooperative agreement, upon application of two or more municipalities, for submission to the voters of the municipalities involved, which agreement shall contain the conditions under which the specified educational function may be carried out.

QUESTIONS:

(1) May a cooperative agreement be prepared and entered into, under the provisions of Title 20, M.R.S.A. § 309, to carry out, as a "specified educational function," the construction and operation of a school?

(2) Would a project for the construction of a school, which is carried out by means of a cooperative agreement prepared and entered into pursuant to the provision of Title 20 M.R.S.A., § 309, be eligible for State School construction aid under Title 20 M.R.S.A., § 3457?

ANSWERS:

(1) No.

(2) The answer to question 1 obviates an answer to this question.

REASONS:

Title 20 M.R.S.A. § 309 provides in pertinent part, that,

"the school committees or boards of directors of various administrative units may file an application with the State Board of Education for the purpose of entering a cooperative agreement to carry out a *specified educational function.* The application shall be in a form and containing such information as required by the board. An agreement so applied for *shall* be submitted to the citizens of each unit for acceptance or rejection." (Emphasis supplied)

Although it would seem from the above quoted provisions that, if an application for the purpose of entering a cooperative agreement sets forth the "specified educational function" to be accomplished and is in the form and contains such information as required by the Board, the State Board of Education must prepare the cooperative agreement for submission to the citizens of each administrative unit involved for acceptance or rejection, it must first be determined in each case whether the proposed cooperative venture is a proper "specified educational function" which the Legislature intended should be carried out by means of a cooperative agreement. Unfortunately, no specific definition of the key phrase, "specified educational function," is given in either section 309 or in any other section of Title 20. It does appear, however, from the provisions of the second paragraph of section 309, that the "specified educational functions" that are to be carried out by cooperative agreement must be capable of being funded and budgeted for on an "annual" basis. This requirement for annual funding and budgeting of cooperative ventures would seem to preclude the construction of a school by means of a cooperative agreement.

Furthermore, when section 309 of Title 20 was enacted, the provisions of Title 20, Chapter 11 (§§ 351-360) had already been in existence, in substantially the same form, for some 24 years. These provisions of Chapter 11 contain specific procedures whereby two or more towns or administrative units may combine their resources by forming, organizing and operating a Community School District for the purpose of constructing and operating a school or schools.

In view of the fact that the Legislature is presumed to have been aware of the existence of chapter 11 when it enacted section 309, it would not seem reasonable to construe the provisions of that section as being intended by the Legislature to provide a second procedure for accomplishing the same purposes. Instead, it would appear that this newly enacted section was intended for use in carrying out specific educational projects and programs that are more limited, in scope and function, than the construction and operation of an entire school.

CRAIG H. NELSON
Assistant Attorney General

April 19, 1972
Adjutant General

E. W. Heywood, Adjutant General

Adjutant General – Group Life Insurance

SYLLABUS:

State funds may not be used by the Adjutant General to pay the premiums for life

insurance coverage for National Guard members during State ordered active duty.

FACTS:

Stated in the question.

FIRST QUESTION:

If sufficient State funds were available to the Adjutant General, would it be proper for him to expend such funds to pay the premiums for life insurance coverage for members of the National Guard during any period of performance of State ordered active duty?

SECOND QUESTION:

Were the State active duty or "Militia" Insurance Plan operative for the Maine National Guard, is there any reason why the provisions of Title 39 would not apply?

ANSWERS:

1. No.
2. Moot.

REASONS:

Nothing in the statutes expressly authorizes the Adjutant General to expend State funds to purchase life insurance coverage for members of the National Guard. Nothing has been found in any statute which might fairly be said to imply such authority. On the other hand, several statutes appear to negate any such authority.

The Legislature has expressly provided for group life insurance coverage for State employees. It has also provided the method of operation of such a program, with express provisions requiring premium payment by the employees. See Chapter 101, Title 5, Revised Statutes. This chapter is made applicable to "employees" as defined in 5 M.R.S.A. § 1001, subsection 10, which states, in pertinent part,

> " 'Employee' shall mean any regular classified or unclassified officer or employee in a department. . . ."

5 M.R.S.A. § 711 states that

> "The unclassified service comprises positions held by officers and employees who are:
>
> ". . . .
>
> "6. Military. Officers and enlisted men in the National and Naval Militia of the State."

Hence, a member of the National Guard while engaged in State ordered active duty would be a "State employee." Such statutory provisions would seem to convey a negative inference as to the authority of any State agency, including the Adjutant General, to provide wholly-State-paid life insurance for any of its employees. It is recognized that 5 M.R.S.A. § 1151, subsection 1, authorizes the Board of Trustees to provide regulations excluding certain employees "on the basis of nature and type of employment or conditions pertaining thereto, such as, but not limited to, emergency, temporary or project employment and employment of like nature." Assuming that such

regulations excluded National Guard members from eligibility for the group life insurance coverage provided in subchapter VI, chapter 101, of Title 5, Revised Statutes, this circumstance would not alter the apparent State policy as indicated by the Legislature, that life insurance should not be provided free to State employees.

25 M.R.S.A. § 712 specifies the various powers and duties of the Adjutant General. One paragraph of that section provides:

> "Without cost or liability to the State at any time, the Adjutant General may enter into insuring agreements with authorized insurance carriers for group life insurance or group health and accident insurance or prepayment plans for hospital and medical service or insurance for the army and air technicians employed by the military establishments as state employees and paid from federal funds."

While the above-quoted provision applies to certain federally paid State employees of the military establishment, the expression – "Without cost or liability to the State at any time" – indicates a policy of not providing State paid life insurance.

In view of the negative answer to the first question, the second question would seem to be entirely academic at this time.

CHARLES R. LAROUCHE
Assistant Attorney General

April 28, 1972
State Planning Office

To: Philip Savage

The Mandatory Zoning and Subdivision Control Law (12 M.R.S.A. §§ 4811 – 4814, P.L. 1971, c. 535).

SYLLABUS:

The mandatory zoning requirements of The Mandatory Zoning and Subdivision Control Law (12 M.R.S.A. §§ 4811 - 4814, P.L. 1971, c. 535) does not apply to streams other than rivers.

FACTS:

The Mandatory Zoning and Subdivision Control Law, 12 M.R.S.A. §§ 4811 - 4814 (P.L. 1971, c. 535) requires municipalities to zone "shoreland areas" by June 30, 1973. "Shoreland areas" are defined in section 4811 as land areas "within 250 feet of the normal high water mark of any navigable pond, lake, river or salt water body."

QUESTION:

Are "streams" included within the statutory definition of "shoreland areas?"

ANSWER:

Only streams which are rivers are included within the statutory definition of "shoreland areas."

REASONING:

L.D. 1543, entitled "AN ACT to Provide Certain State Level Land Use Controls" was the draft of The Mandatory Zoning and Subdivision Control Law ultimately enacted as P.L. 1971, c. 535. L.D. 1543 defined "shoreland areas" as land areas "within 500 feet of the normal high water mark of any navigable pond, lake, river, *stream,* or salt water body (italics supplied)."

Senate Amendment "A" (Filing No. S-213) amended L.D. 1543 "by striking out . . . the . . . word *'stream'.*" The Statement of Fact read: "The purpose of this amendment is to remove streams from the bill."

In addition the following statement, by a Representatives, on the floor of the House, is noteworthy:

> "The amendment that comes over to us from the other body excludes streams from the bill. Interestingly enough, the reason why streams was excluded is because of a lobbyist . . . . The individual represented a large paper company and he was concerned that because they had an awful lot of land that the streams that they had in the individual townships might just be covered. . . ." *House Legislative Record,* May 27, 1971.

The history of a statute may be referred to, to indicate legislative intent. *Hutchins v. Libby,* 149 Me. 371, 103 A.2d 117 (1954). In construing the language which has been used, the history of an enactment may throw light on the intent of the Legislature. *Steele v. Smalley,* 141 Me. 355, 44 A.2d 213 (1945). In construing a statute, the sole duty of the Supreme Judicial Court is to give effect to legislative intent, which is determined by looking first to the language used and then to history of legislation. *Opinion of the Justices,* 38 A.2d 566 (Me., 1944).

The word "stream" is a generic term which generally is understood to mean "a water course having a source and terminus, banks, and channel, through which water flows at least periodically" and includes within its definition rivulets, brooks, creeks and rivers. See *Black's Law Dictionary* (4th Ed. 1951); *Webster's Third New International Dictionary* (1963); 40 Words and Phrases *Streams;* and Hobday, S. R., *Coulson & Forbeson Waters and Land Drainage* (6th ed. 1952).

The word "river" is not capable of precise legal definition. "River" is generally understood to simply mean "a body of flowing water of no specific dimensions larger than a brook or rivulet, a running stream pent in on each side by walls or banks." 37A Words and Phrases, *River.* See also *Black's Law Dictionary* (4th ed. 1951) and *Webster's Third New International Dictionary* (1963).

It seems clear that the Legislature in enacting P.L. 1971, c. 535 intended to exclude streams smaller than rivers, i.e., brooks, creeks, rivulets, from the operation of the Act.

Whether a body of water is a river or some other type of stream is a question of fact for initial administrative determination. While we perceive of no difficulty in determining whether most streams in the State are rivers or not, there may be a number of instances where the determination will be difficult. We suggest that these cases must be determined upon an ad hoc basis with particular regard to the stream's length, width and depth, volume and frequency of water flowage, navigability and other physical characteristics and perhaps its history.

This opinion modifies the previous opinion of this office given to William R. Adams, Director, Environmental Improvement Commission, under date of August 19, 1971, a copy of which is attached herewith.

E. STEPHEN MURRAY
Assistant Attorney General

August 19, 1971
E.I.C.

William R. Adams, Director

Questions concerning Me. Public Laws 1971, c. 535

SYLLABUS:

The mandatory shoreland areas zoning requirements of Me. Public Laws 1971, c. 535, apply within 250 feet of the normal high water mark of all navigable flowing bodies of water in the State.

Whether a body of water is "navigable" is a question of fact for administrative determination in the first instance.

FACTS:

By memo you have asked the following questions regarding interpretation of Me. Public Laws 1971, c. 535.

QUESTION NO. 1:

The subject law defines the term "shoreland areas" as "those land areas any part of which are within 250 feet of the normal high water mark of any navigable pond, lake, river or salt water body. . ." Can the word "river" be construed to include brooks and streams?

ANSWER NO. 1:

Yes, if such flowing bodies of water are navigable.

OPINION NO. 1:

The word "river" as used in the subject law should, in our view, be read in conjunction with the term "navigable" which modifies it. Read together, these words evince a legislative intent that the subject law apply to flowing bodies of water which are navigable.

QUESTION NO. 2:

What constitutes a "navigable" body of water for purposes of the subject law?

ANSWER NO. 2:

See opinion.

OPINION NO. 2:

Whether a body of water is navigable is a question of fact for administrative determination, and not a question of law. *See Flood v. Earle*, 145 Me. 24, 71 A.2d 55

(1950). Maine case law indicates that the capability of use for transportation is the criterion of whether or not a stream is navigable. *Smart v. Aroostook Lumber Co.* 103 Me. 37, 68 Atl. 527 (1907). All bodies of water which in their natural condition are capable of floating boats, rafts and logs are under Maine law "navigable". *Ibid.: see also Wilson & Son v. Harrisburg,* 107 Me. 207, 77 Atl. 787 (1910). Some specific waters have had their navigability adjudicated, *e.g., State v. Plant,* 130 Me. 261, 155 Atl. 35 (1931) (Kennebec River); *Smart v. Aroostook Lumber Co., supra* (Presque Isle stream); *Veazie v. Moor,* 55 U.S. 568 (1852) (Penobscot River).

QUESTION NO. 3:

The subject law uses the term "municipal units of government". What is the meaning of this term?

ANSWER NO. 3:

The term "municipal units of government" should be considered to have the same meaning as the term "municipality" as defined in 1 M.R.S.A. § 72, sub-§ 13.

QUESTION NO. 4:

The subject law empowers the commission, in conjunction with another State agency, to adopt a shoreland zoning ordinance for any municipality who fails to do so by June 1, 1973 or for any municipality whose shoreland zoning ordinance is, in the judgment of these agencies, lax and permissive. You inquire how the Commission is to determine whether local ordinances are adequate.

ANSWER NO. 4:

Not answered.

OPINION NO. 4:

The subject law places the burden of determining adequacy of local shoreland zoning ordinances upon the two named state agencies. Accordingly, these agencies must internally develop their own methods for determining such adequacy. After such methods have been developed, we will be pleased to review them if you wish.

QUESTION NO. 5:

Is the question of laxity and permissiveness of a local shoreland areas zoning ordinance to be judged by reference to the letter of the ordinance alone, or may the commission consider the record of the municipality's administration and enforcement of the ordinance as well?

ANSWER NO. 5:

Not answered.

OPINION NO. 5:

We again direct your attention to the fact that the subject law leaves the determination of adequacy of local shoreland zoning ordinances upon the named state agencies. The agencies must develop their own criteria for determining adequacy. The municipality's record of administration and enforcement of the ordinance may well be a factor which the Commission might wish to consider in making its determination.

ROBERT G. FULLER, JR.
Assistant Attorney General

April 27, 1972
Pineland Hospital & Training Center
Mental Health and Corrections

To: Anthony L. Meucci, Business Manager

Housing and Food Supplies Furnished by State Institutions

SYLLABUS:

An affiliation program whereby students from hospitals and universities at Pineland for a training period, would receive free room and board in lieu of any other compensation, is not affected by P.L. 1971, Chapter 588. Nor does this law apply to parents of patients at Pineland for evaluation who receive accommodations without charge. If those parents are essential to the proper evaluation of the patient at Pineland, they may receive accommodations at Pineland but unless indigent, must be assessed the cost of such accommodations.

FACTS:

Pineland Hospital and Training Center wishes to establish affiliations with various hospitals and universities whereby students from those institutions would receive free room and board in lieu of any other compensation while at Pineland. In addition, Pineland has maintained a one-motel unit for the housing of the parents of an outpatient who is at Pineland for an evaluation.

QUESTIONS:

1. May Pineland Hospital and Training Center continue to provide meals and lodgings to students from universities and hospitals who are affiliating with said hospital in light of recent State law?
2. May Pineland continue to provide lodging at no cost to parents of patients at Pineland for evaluation?

ANSWERS:

1. Yes.
2. No.

REASON:

R. S. T. 5, §§ 8-A - 8-C, Enacted by P.L. 1971, Chapter 588, is an Act relating to housing and food supplies furnished by state departments to state employees. That Act's emergency preamble reads in part,

> "Whereas, a constant review of providing means for housing and food for state employees is essential, if state government is to continue to provide the services required of it in an efficient and economical manner;. . . *Be it enacted by the People of the State of Maine,* as follows:
>
> § 8-A. Declaration of purpose
>
> For the benefit of the people of the State, it is essential that certain activities of the State Government be constantly reviewed in order to provide essential state services more efficiently and economically. To aid in accomplishing this purpose and due to improved travel conditions and communications, housing for state employees at state institutions and other areas of State Government and commissaries operated by state departments for the sale of food and food supplies to state employees shall be controlled as set forth in sections 8-B and 8-C respectively."

From the language in the preamble and in the Declaration of purpose, it is clear that this Act is aimed specifically at state employees. Students in an affiliation program with Pineland are not employees. They are students whose sole purpose for being at Pineland is for the clinical experience which is essential if they are to become proficient in their chosen profession. They are not there for the purpose of earning a living.

From the language throughout Chapter 588, it is clear that the legislature did not intend that this chapter should apply to anyone but state employees. Thus, an affiliation program with various universities and hospitals is not prohibited by this recent law.

The question of providing lodging at no cost to parents of patients at Pineland for evaluation, is an entirely different matter. While this law does not seem to apply to anyone but state employees, it is not clear that anyone's relatives should receive free housing at Pineland. Chapter 588 does make provisions for some employees, if they meet a criteria, to be provided with housing at state institutions but even that must be at cost. There should be little doubt that if the parents of patients at Pineland for evaluation are housed at Pineland only to be near their children, it would be very difficult to find authority to allow them to be so housed. However, if it is true that the parents are an integral part of that patient's evaluation, and without them the effective examination of the patient could not be carried out, then their use of Pineland accommodations would be entirely proper. This determination would be properly the responsibility of the hospital staff. If, after such a determination, they concluded that parents are an essential part of such an evaluation, it is still not clear that those accommodations should be provided free of charge. Title 34, Section 2512 states,

> "Each patient and the spouse, adult child and parent, jointly and severally, shall be legally liable from the date of admission for the care and treatment of any patient committed or otherwise legally admitted to either state hospital for the mentally ill, the Pineland Hospital and Training Center or the Regional Care facility for the Severely Mentally Retarded at Bangor, except that a parent shall not be legally liable for care and treatment unless the patient was wholly or partially dependent for support upon such parent at the time of admission."

Since the parents of the patient at Pineland for evaluation are responsible for the cost of that evaluation, then they should also be responsible for the cost of any housing provided for them at Pineland. However, if the parents are indigent, it would seem that

they are not liable for either the cost of the evaluation of the patient or for the housing provided to them. This determination of the ability to pay should be done in light of Title 34, Section 2513 which states in part,

"It (Department of Mental Health and Corrections) shall ascertain the financial condition of any such person (parents) and shall determine whether in each case such person is in fact financially able to pay such charges."

The affiliation program as operated in the past, whereby students receive free room and board in return for their services, does not seem to be affected by recent law. Parents of patients at Pineland for evaluation, however, unless indigent, must pay for the actual cost of their stay at Pineland.

WILLIAM J. KELLEHER
Assistant Attorney General

May 11, 1972
Secretary of State

Peter M. Damborg, Deputy

Limitations on Expenditures for Political Advertising by Candidates – Effect of the Federal Campaign Act of 1971

By your memorandum dated April 11, 1972, you have asked whether the Federal or State law takes precedence in the matter of governing limitations on the amount which candidates of the United States Senate and the Congress can spend.

In my opinion, Title I of the Federal Campaign Act of 1971 P.L. 92 - 225; 86th stat. (3) entitled the "Campaign Communications Reform Act" has in effect pre-empted the field and with certain minor exceptions in the area of final reports, governs the matter of expenditures for political advertising by candidates for the United States Senate and the United States House of Representatives.

The Federal Act covers specifically expenditures for the use of "Communications Media", which are defined in § 102 (1) thereof to mean 'Broadcasting stations, newspapers, magazines, outdoor advertising facilities and telephones . . . ." The Federal Act also covers, by implication, any other expenditures which may legally be made by candidates including all printed matter.

Article VI, Clause 2, of the Constitution of the United States, provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or bylaws of any state to the contrary notwithstanding."

In *State v. Cohen,* 133 Me. 293, 299, it is said:

"The Constitution of the United States is the supreme organic law. A state statute repugnant to the Federal Constitution is void."

In the *Constitution of the United States of America,* revised and annotated, 1963, at P. 808, it is said that in applying the supremacy clause to subjects which have been regulated by Congress, the primary task of the court is to ascertain whether a challenge to the state law is compatible with the policy expressed in the federal statute. "To the federal statute and policy, conflicting state law and policy must yield." And on P. 808, it is stated that today the application of the supremacy clause is becoming, to an ever

increasing degree, a matter of statutory interpretation – a determination of whether the state laws and regulations can be reconciled with the language and policy of federal enactments.

In *Reynolds vs. Sims,* 377 U.S. 533, it is stated that, "When there is an unavoidable conflict between the federal and a state constitution, the supremacy clause, of course, controls."

In *Auburn Savings Bank vs. Portland R Company,* 144 Me. 74, cert. den., 338 U.S. 831, reh. den., 338 U.S. 881, the court said (on page 90),

> ". . . the states are barred, either by legislation or by court action from interfering in any way with the overriding federal authority."

In *State vs. the University of Maine* (Me.) 266 A. 2d 863, it was held that a state statute providing that the state educational television system might not be used for promotion or advancement of any political candidate violated the supremacy clause of the Constitution of the United States in that it would be impossible for the operator of an educational television system to obey the rigid censoring requirements of the statute, and at the same time satisfy federal licensing requirements that programs be shown which are in the public interest.

It would seem clear, then, that with respect to the five areas of communications media mentioned above, the federal "Campaign Communications Reform Act" has specifically pre-empted the field.

This Federal Act, however, has no specific provision which limits expenditures for any type of advertising not therein defined as "communications media." Printed matter, addressed and mailed to prospective voters, designed to promote a political candidacy is not included in the federal definition of "communications media." The question, then, is whether such advertising is nevertheless controlled by or under the umbrella of the Federal Act by reason of § 403 (b) or by reason of the purpose or policy of the Federal Act to limit campaign spending.

Section 403 of the Federal Act provides as follows:

> "(a) Nothing in this Act shall be deemed to invalidate or make inapplicable any provision of any state law, except where compliance with such provision of law, would result in a violation of a provision of this Act.
>
> (b) *Notwithstanding subsection (a),* no provision of state law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure (as such term is defined in § 301 (f) of this Act) which he could lawfully make under this Act." (Emphasis Supplied)

This raises the important question, what is meant by the words "under this Act" in § 403 subparagraph (b) quoted above?

In *Words and Phrases,* Volume 43, pages 149, et seq., it is stated that "under" may mean "in accordance with" and "in conformity with." *(Citing Wilmington Trust Company vs. Morris)* (Del.) 54 A. 2d 851, 853.

Section 403, subparagraph (b) provides that: "No provision of state law shall be construed to prohibit any person from . . . making any expenditure which he could lawfully make under this Act." I judge that a candidate for the United States Senate or the United States House of Representatives may lawfully make an expenditure under the Federal Act which is not prohibited by the Act. Inasmuch as the Federal Act is silent on the subject of direct mail advertising, or printed matter of any kind, it follows that the federal government did not intend to make expenditures for these purposes either unlawful or limited by the amount of money that could be spent. It would follow that if expenditures for printed matter, advertising and mailing may be lawfully made under the Federal Act, the state's statutes limiting such expenditures by virtue of 21 M.R.S.A. §

1395, subparagraphs 3 and 4 as enacted by P.L. 1971, Chapter 207 cannot limit these expenditures by Congressional and Senatorial candidates.

In the last analysis, the United States Senate and the United States House of Representatives have the final word as to who shall sit in their halls. They clearly also have the power to set the procedural limitations and requirements for entering those halls. Inasmuch as they have ruled by statute in this area as to what the proper procedure shall be, in my opinion the field is now exclusively in the hands of the Federal law makers; and the State of Maine is not in a position to add or detract therefrom.

JAMES S. ERWIN
Attorney General

May 30, 1972
Insurance

Theodore T. Briggs, Deputy Commissioner

Insurance – Dealer Liability Insurance

SYLLABUS:

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 vehicle dealer, loaner or transporter does not meet the requirements of 29 M.R.S.A. § 832.

FACTS:

An insurance company is issuing a vehicle insurance policy which has the following pertinent provision regarding limitation of liability:

> "any other person or organization legally responsible for the use thereof only while such automobile is physically operated by the named insured or any such partner or paid employee or director or stockholder, or member of the household of the named insured or partner or paid employee or director or stockholder, provided the actual use of the automobile is by the named insured or with his permission."

It further appears that the insurance company concedes that its policy provides no coverage when the vehicle is bearing plates of a dealer, loaner or transporter and is being operated by one of its customers.

QUESTION:

Does a vehicle insurance policy meet the requirement of 29 M.R.S.A. § 832 when the policy fails to provide insurance coverage while the vehicle is being operated by a customer with the vehicle bearing the plates of a dealer, loaner or transporter?

ANSWER:

No.

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.

CHARLES R. LAROUCHE
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.

JOHN W. BENOIT, JR.
Deputy Attorney General

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?

ANSWER NO. 1:

No. Any attempt is void and of no legal effect.

ANSWER NO. 2:

Only the Legislature could grant a valid easement, being an interest in land. The Department of Indian Affairs can give a license, not an interest in land, for continued operation of the power transmission lines.

REASONS:

The Penobscot reservation land on which an Indian resides is not "owned" by that Indian. Attorney General's Report 1951-54, page 110. The nature of the interest held by an Indian has been said to be a qualified fee and a fee simple determinable. *John V. Sabattis,* 69 Me. 473, 478; Attorney General's Opinion December 21, 1966. Conveyance of lots assigned to him may be made only to other Penobscot Indians. 22 M.R.S.A. §§ 4777, 4778. The actual control of tribal lands has long been in the State. The reservation, held for the use of the Indians, is State land. Attorney General's Report 1903-04, page 51.

An easement is a right in the owner of one parcel of land to use the land of another, for a specific purpose. *Black's Law Dictionary,* 4th ed., page 599. It is an interest in land. An easement over State land can be conveyed only by authority of the Legislature, while a license (which does not convey an interest in land) can be granted by a State department without legislative approval. Attorney General's Report 1961-62, page 125.

The 1931 writings purporting to grant easements could only be valid if done pursuant to legislative authorization. No such authorization has been found to exist then or now. Moreover, by its terms, the sample "contract of easement" submitted for our inspection is made subject to approval of the Penobscot Indian Agent, and his signature of approval does not appear. We can only conclude that the writings are void and of no legal effect.

Additionally, there can have been no easement acquired by prescription (similar to land titles passing by adverse possession) where State land is involved. See C.J.S. *Easements* § 9.a. As the question was analyzed and answered in *Woodworth v. Raymond,* 51 C ⊓n. 70, involving Indians forbidden by statute from conveying their farm, since a prescriptive easement is based on the presumption of a grant, it follows that no prescriptive rights can be acquired as against a party who is legally incapable of making a grant.

JOHN KENDRICK
Assistant Attorney General

June 15, 1972
Environmental Improvement Comm.

Henry Warren

Solid Waste Disposal Areas; Location. 38 M.R.S.A. § 421 (P.L., 1971 c.440).

SYLLABUS:

The Solid Waste Disposal Area Law, 38 M.R.S.A. § 421 (P.L. 1971, c. 440) prohibits the disposal of solid waste closer than 300 feet to any classified body of water. Solid waste disposal areas located within the prohibited area as of the effective date of the law, September 23, 1971, may continue to be used until November 30, 1972, but may not be expanded beyond the physical boundary of the area actually being used for solid waste disposal as of September 23, 1971. While these "grandfathered areas" must be discontinued prior to December 1, 1973, this statute does not require the reclamation of such areas. The Environmental Improvement Commission has no authority to permit the location of solid waste disposal areas closer than 300 feet to any classified body of water. It may act to determine that a solid waste disposal area is "suitably removed from a classified body of water" only as to areas established after September 23, 1971. Finally, a determination by the E.I.C. that a solid waste disposal area is "suitably removed from a classified body of water" will not prevent the E.I.C. from enforcing other statutes upon new evidence or upon discovering its earlier decision was based upon inadequate, misleading or false evidence, or a decision involving an erroneous conclusion of fact or law, or the existence of changing conditions.

QUESTIONS:

1. What does the term "boundary" mean in 38 M.R.S.A. § 421?
2. Does 38 M.R.S.A. § 421 authorize the E.I.C. to permit the location of a solid waste disposal area whose boundary is closer than 300 feet to a classified body of water?
3. Does 38 M.R.S.A. § 421 require a party to remove refuse he has deposited on a solid waste disposal area whose boundary is closer than 300 feet to any classified body of water prior to December 1, 1973, or is such a party simply required to discontinue using the area for solid waste disposal after December 1, 1973?
4. Does Paragraph 4 of 38 M.R.S.A. § 421 allow a party who at the effective date of the law maintained a dump less than 300 feet from a body of water to move the boundary of that dump even closer to the body of water prior to December 1, 1973?
5. If the E.I.C. pursuant to Paragraph 3 makes a determination that the boundaries of a proposed dumping area are "suitably removed from any classified body of water", is the E.I.C. later prohibited from enforcing any of the other water pollution statutes for which it is responsible as to that dumping area and that body of water if it is later determined that the dumping area is resulting in water pollution?
6. Does the third paragraph of 38 M.R.S.A. § 421 apply to current solid waste disposal areas as well as future areas?

ANSWERS:

1. The term "boundary" in 38 M.R.S.A. § 421 means the physical boundary of the area upon which solid waste is being disposed as established by the actual location of the solid waste, and not the legal boundary of the parcel of land upon which solid waste disposal is occurring.

2. No.

3. 38 M.R.S.A. § 421 simply requires the discontinuance of the use of areas located within 300 feet of a classified body of water after December 1, 1973 and does not require the removal of solid waste legally deposited there prior to December 1, 1973.

4. No.

5. No, but see reasoning.

6. The third paragraph of § 421 is applicable only to solid waste disposal areas established after September 23, 1971.

REASONING:

38 M.R.S.A. § 421 (P.L. 1971, c. 440) states:

> "No boundary of any public or private solid waste disposal areas shall lie closer than 300 feet to any classified body of water.
>
> "If the Environmental Improvement Commission shall determine that soil conditions, groundwater conditions, topography or other conditions indicate that any boundary of any such area should be further than 300 feet from any classified body of water, it may, after notice to and a hearing with the affected party, order the relocation of such boundaries and the removal of any solid waste, previously deposited within the original boundaries, to the confines of the new boundaries.
>
> "Any person, corporation, municipality or state agency establishing a solid waste disposal area after the effective date of this Act may apply to the commission for a determination that the boundaries of the proposed area are suitably removed from any classified body of water.
>
> "Any solid waste disposal area whose boundary is closer than 300 feet to any classified body of water shall be discontinued in conformity with this section prior to December 1, 1973."

1. If the term "boundary" were read to mean the legal boundary of the parcel of land upon which solid waste disposal is occurring, then § 421 would have to be read as permitting solid waste disposal after September 23, 1971, the effective date of the law, but prior to December 1, 1973, within 300 feet of a classified body of water upon land not being used for solid waste disposal prior to September 23, 1971, so long as any part of the parcel was used for solid waste disposal prior to September 23, 1971. In other words, we would have to assume that while the Legislature recognized that solid waste disposal within 300 feet of a classified body of water presented a high degree of likelihood of water pollution, it not only allowed a temporary continuation of water pollution by those persons using solid waste disposal areas in the prohibited zone as they existed on September 23, 1971, but further, that the Legislature intended to allow increased pollution during the interim period. In our opinion, to attribute to the Legislature the intention of permitting expansion of pollution activities would be wholly erroneous. In addition, the grandfather clause of § 421 is an exception to the general prohibition against solid waste disposal in the prohibited zone, and as such, should be narrowly construed. 82 C.J.S. *Statutes* § 382.C.

Further, if the term "boundary" were read to mean the "legal boundary", then the

sentence of § 421 would have to be read as requiring a party to wholly discontinue use for solid waste disposal, of a parcel, any part of which fell within the prohibited zone. Alternatively, such a party would be required to convey away that portion of the parcel falling within the prohibited zone so as to insure that the legal boundary did not fall within the prohibited zone. For example, a city owning a 100-acre parcel of land, a half acre of which was within 300 feet of a classified body of water would be unable to use any part of that parcel for solid waste disposal. This would be absurd and the Legislature is presumed not to intend an absurd result. *State v. Larrabee,* 156 Me. 115, 161 A.2d 855 (1960).

Finally, the second sentence of § 421 permits the E.I.C. to order the relocation of boundaries under certain circumstances. To read the term "boundaries" in this context as meaning "legal boundaries" would be to hold that the E.I.C. has the power to order the conveyance of real property. Not only would this result be absurd, but would most likely be violative of M.R.S.A. Const. Art I, § 1 which secures to all men the right to acquire and possess property.

2. Section 421 is an absolute prohibition against the disposal of solid waste within 300 feet of a classified body of water, with a temporary exception for solid waste disposal areas as they existed on September 23, 1971. This is clear from a reading of the first and last sentences of that section. That the E.I.C. has no power to permit the location of solid waste disposal areas in the prohibited zone is clear, not only from a plain reading of that section, but also because there are absolutely no standards set forth in the law against which the E.I.C. could measure a proposal to locate a solid waste disposal area in the prohibited zone. Without such standards, the statute, or the part of it being discussed, would be unconstitutional. *Stucki v. Plavin,* Me., –A.2d– (June 7, 1972.).

3. The term "discontinue" means "to interrupt the continuance of; to intermit, as a practice or habit; . . . to abandon" *Webster's New International Dictionary* (2nd Ed., Unabridged, 1961). Words and phrases in statutes are construed according to common meaning. *Portland Terminal Co. v. Boston and Maine R.R.,* 127 Me. 428, 144A. 390 (1929). The last sentence of § 421 states that solid waste disposal areas located less than 300 feet from classified bodies of water shall be "discontinued" prior to December 1, 1973. The statute contains no language suggesting Legislative intent to require reclamation of those areas used for solid waste disposal in the prohibited zone prior to December 1, 1973. In addition, it is unlikely that the Legislature intended to designate "temporary solid waste storage areas". Strained and forced construction of statutes are not looked upon with favor by the courts. *Pease v. Foulkes,* 128 Me. 293, 147 A. 212 (1929).

4. Section 421 was effective September 23, 1971. As of that date it became unlawful to dispose of solid waste closer than 300 feet to any classified body of water with the exception of waste disposal areas located in the prohibited zone as of September 23, 1971, which were grandfathered until December 1, 1973. To read the statute as permitting expansion of these non-conforming uses would necessitate construing the word "boundary" to mean the legal boundary of the parcel of land upon which the solid waste disposal area was located. This construction of the word "boundary" has been rejected for the reasons set forth in "1" above. In addition, as previously pointed out, grandfather clauses are to be narrowly construed.

5. If the E.I.C., upon proper application, determines on the basis of the facts before it, that a proposed solid waste disposal area would not be violative of the criteria set forth in that portion of the statute which allows the E.I.C. to order relocation of a solid waste disposal area to a position greater than 300 feet from a classified body of water, its

determination that the solid waste disposal area is "suitably removed from any classified body of water" will not prevent it from enforcing other statutes when new evidence is discovered or there is a later determination that the decision was based upon inadequate, misleading or false evidence or information or involved an erroneous legal conclusion, or where conditions have changed. An administrative agency may change its decision when that decision rests upon inadequate, misleading or false evidence, involves an erroneous conclusion of fact or law or where a change of conditions has occurred since its prior decision. 2 Davis, *Administrative Law Treatise* § 18.03.

6. A plain reading of the third paragraph of § 421 makes it clear that this third paragraph applies only to solid waste disposal areas established after September 23, 1971. That paragraph states:

> "Any person . . . *establishing a solid waste disposal area after the effective date of this Act* may apply to the commission for a determination . . . . " (Emphasis supplied.)

E. STEPHEN MURRAY
Assistant Attorney General

June 22, 1972
Health and Welfare

J. L. Faulkner, Sanitary Engineering

The Minimum Lot Size Law; Reardon Subdivision in Freeport; your memo of June 16, 1972

SYLLABUS:

That section of the Minimum Lot Size Law, 12 M.R.S.A. § 4801-4806 (P.L. 1969, c. 365 § 1, as amended by P.L. 1971, c. 532) requiring a minimum frontage of 100 feet for any lot abutting on a public road, lake, pond, river, stream or seashore applies to all lots regardless of their size, and the Department of Health and Welfare has no power to waive this requirement of the statute as to lots located on lakes, ponds, rivers, streams or the seashore.

FACTS:

A developer desires to sell lots located on a river for residential use. While each lot would contain more than 20,000 square feet, some would have a river frontage of less than 100 feet.

QUESTIONS:

(1) Does the 100 foot minimum frontage requirement of the Minimum Lot Size Law apply to lots of 20,000 square feet or more?

(2) Does the Department of Health and Welfare have the power to waive this requirement as to lots located on rivers?

ANSWERS:

(1) Yes.
(2) No.

REASONING:

(1) Section 4801 states:

". . . a lot of land which is not served by public or private community sewer . . . shall not be used for single family residential purposes unless such lot of land contains at least 20,000 square feet; and if the lot abuts on a public road, lake, pond, river, stream or seashore it shall further have a minimum frontage of 100 feet."

A plain reading of section 4801 makes it clear that "the lot" referred to in the second phrase of the section means any "lot of land which is not served by public or private community sewer . . . " The section does not contain any language to indicate the requirements of 20,000 square feet and 100 foot frontage are alternative requirements.

(2) Section 4801-A provides that the Department of Health and Welfare may waive the requirements of section 4801 as they relate to "the minimum frontage of a lot abutting on a public road." A plain reading of that section makes it clear that the minimum frontage requirement cannot be waived as to lots located anywhere but on a public road.

E. STEPHEN MURRAY
Assistant Attorney General

July 17, 1972

James S. Erwin, Attorney General

Baxter State Park Trust Fund Income

SYLLABUS:

All income, produced in any manner and however characterized, from the Baxter State Park Trust Fund, must either be expended solely "for the care, protection and maintenance" of Baxter State Park or accumulated in that Fund pending such expenditure. Allocation of any such income to any other purpose, including to the General Fund, is improper.

FACTS:

It appears that subsequent to the gift in trust of certain land known as Baxter State Park to the People of the State of Maine, the Honorable Percival Proctor Baxter made a gift in trust to said people of one thousand shares of the capital stock of the Proprietors of Portland Pier Corporation. That gift was accepted by said people by enactment of Chapter 21, Private and Special Laws of 1961, in the following pertinent words:

" . . . to be held IN TRUST forever for the benefit of the people of the State of

Maine and to be known as Baxter State Park Trust Fund the principal thereof to be invested and reinvested, the income therefrom to be used by said State for the protection and operation of said 193,254 acres of forest land known as BAXTER STATE PARK."

It further appears that Governor Baxter subsequently made a gift in trust to said people of one thousand shares of stock of the Congress Realty Company. That gift was accepted by said People by enactment of Chapter 30, P & S Laws of 1965, in the following pertinent words:

"to be held IN TRUST forever for the benefit of the people of the State of Maine and to be added to Baxter State Park Trust Fund the principal thereof to be invested and reinvested, the income therefrom to be used by said State for the care, protection and operation of said 201,018 acres of forest land known as BAXTER STATE PARK as provided in Laws of Maine (1961), Chapter 21, and administered according to the provisions of said Baxter State Park Trust Fund."

Paragraph 1 of the Third Clause of the Governor Baxter Trust reads:

"1. To pay the net income therefrom at least as often as quarterly to the 'BAXTER STATE PARK TRUST FUND' created by Chapter 21 of the Private and Special Laws of 1961 enacted by the Legislature of the State of Maine for the *care, protection and operation* of the forest land known as BAXTER STATE PARK, and for other forest lands hereinafter acquired by the State of Maine under the provisions of this TRUST for recreational or reforestation purposes." (Emphasis supplied).

On July 12, 1961, Governor Baxter wrote the following letter to State Treasurer Carpenter:

"Will you please keep in mind that I want the 'BAXTER STATE PARK TRUST FUND' recently created by the Legislature to be kept as a *separate and distinct Fund with the securities and income therefrom to be held together* and not mixed or involved in any way with other State Trust Funds. Also I ask you to have none of this Fund used for any purposes until I am consulted and approve.

"After my decease of course the State will carry on as best it can in accordance with my wishes.

"I write this letter so that you will have a definite record of my wishes and am sending a copy to Governor Reed and our Executive Councilors for their record." (Emphasis supplied.)

On July 12, 1961, Governor Baxter wrote the following letter to Governor Reed and Executive Councillors:

"The 'BAXTER STATE PARK TRUST FUND' recently created by the Legislature will *produce and accumulate* income from time to time and that with maturing securities will need to be wisely re-invested.

"I am enclosing you a copy of my letter to Treasurer Carpenter so that he will understand my wishes in this matter.

"There will be no need of using this Fund at present. Before any purchases or payments are made I should like to be consulted.

"This Fund will grow and I want to keep in close touch with it. Please have both these papers inscribed on the Council records." (Emphasis supplied.)

On February 8, 1968, Governor Baxter sent the following letter to State Comptroller Cranshaw:

"In regard to the naming on the States' books of the charitable funds that came from me and of which you have charge, I make the following suggestions so there will be no confusion.

"I understand you have Ninety Thousand Dollars ($90,000.) more or less, which you now carry as 'Mackworth Island Deaf School Fund'. This fund came as a gift from me and I want to close it for I consider the Deaf School as complete except for one item of Eight Thousand Dollars ($8,000.) which I have already approved for some special equipment which will not occur again.

"Hereafter my gifts will go to one account only which you now have 'Baxter State Park Fund', a project which I intend to increase from time to time.

"In other words, I want to build up the 'Baxter State Park Fund' and drop the other 'Mackworth Island Deaf School Fund'. This leaves just one account for my gifts."

QUESTION:

Whether any of the income, including short term earnings, accruing from the Baxter State Park Trust Fund while in the custody of the State of Maine can lawfully be deposited in the General Fund of the State for general State expenditure?

ANSWER:

Negative.

REASONS:

It is clear that the Baxter State Park Trust Fund was established for one purpose only, i.e., for the *care, protection and operation* of the forest land known as Baxter State Park. The special Acts of 1961 and of 1965 expressly acknowledge this limited purpose in accepting the gifts of Governor Baxter to the Baxter State Park Trust Fund. Each Act also expressly declares that the principal is to be "invested and reinvested, the income therefrom to be used by said State *for the care, protection and operation* of said 201,018 acres of forest land known as BAXTER STATE PARK as provided in Laws of Maine (1961) Chapter 21, and administered according to the provisions of said Baxter State Park Trust Fund." Chapter 30, P & S L., 1965. Governor Baxter anticipated that this Fund would "*produce* and *accumulate income* from time to time." Letter to Governor Reed, July 12, 1961.

Black's Law Dictionary, Fourth Edition, defines the word "income" as follows:

"The return in money from one's business, labor, or capital invested; gains, profits, or private revenue. In re Slocum, 169 N.Y. 153, 62 N.E. 130.

"The gain derived from capital, from labor or effort, or both combined, including profit or gain through sale or conversion of capital; income is not a gain accruing to capital or a growth in the value of the investment, but is a gain, a profit, something of exchangeable value, proceeding from the property, severed from the capital, however invested or employed, and coming in, being derived, that is, received or drawn by the recipient for his separate use, benefit, and disposal. Goodrich v. Edwards, 41 S.Ct. 390, 255 U.S. 527, 65 L.Ed. 758. The true increase in amount of wealth which comes to a person during a stated period of time. Commissioner of Corporations and Taxation v. Filoon, 310 Mass. 374, 38 N.E.2d 693, 700."

"Short term" income produced from the Trust Fund investment income is clearly "produced" by and "derived" from the Trust Fund. The donor of the Trust impressed upon this Trust the requirement to expend the "income" from this Trust Fund,

produced in any manner and however characterized, for the one expressed purpose only and to "accumulate" the income produced by that Fund pending such expenditure.

Accordingly, it is clear beyond cavil that *none* of the "income" produced by such Trust Fund, whether it be termed direct investment income, short-term income, or by any other characterization, can be diverted to any other purpose, including to the General Fund of the State. Such diversion to the General Fund is neither an application for the sole expressed purpose of this Trust Fund, nor is it an "accumulation" in a "separate and distinct Fund" as required by the donor of this Trust. Such diversion would constitute a breach of trust.

CHARLES R. LAROUCHE
Assistant Attorney General

July 26, 1972
Land Use Regulation Comm.

James S. Haskell, Jr.

Maine Land Use Regulation Commission Law; Subdivision Permits.

SYLLABUS:

Only persons who had commenced use of or construction on or sold an interest in any subdivision located in the unorganized and deorganized townships and mainland and island plantations of the State before September 23, 1971 are not required to receive a permit prior to such use, construction or sale from the Maine Land Use Regulation Commission.

FACTS:

12 M.R.S.A. § 682.2. defines "subdivision" as follows:

"A subdivision is a division of an existing parcel of land into 3 or more parcels or lots, within any 5-year period, whether this division is accomplished by platting of the land for immediate or future sale, or by a sale of the land by metes and bounds or by leasing."

12 M.R.S.A. § 682.7. defines "development" as follows:

"Development shall mean any land use activity or activities directed toward using, reusing, or rehabilitating air space, land, water or other natural resources."

12 M.R.S.A. § 685-B.1.B. states:

"No person shall commence development of or construction on any subdivision or sell or offer for sale any interest in any subdivision without a permit issued by the Commission."

QUESTION:

Under what circumstances is a person not required to apply for a permit from the Commission prior to engaging in development of or construction on or prior to selling or offering for sale any interest in a subdivision.

ANSWER:

Only those persons who commenced use of or construction on or who actually sold subdivided land prior to September 23, 1971 are not required to obtain a permit from the Commission prior to such use, construction or sale.

REASONING:

12 M.R.S.A. § 685-B.1.B. is best viewed as being directed to three types of activities involving subdivided land, i.e., (1) Development of or construction on any subdivided land; (2) Selling any interest in subdivided land; and (3) Offering to sell any interest in subdivided land. We shall deal with each of these types of activities separately:

(1) Development of or construction on any subdivided land – The statute requires a permit from the Commission before "commencing" development or construction. Obviously, therefore, those who have "commenced" development of or construction on any subdivided land prior to the effective date of the law, September 23, 1971, need not apply for a permit to continue with *such* development or *such* construction. In the absence of any contrary provisions, all laws are construed to commence in futuro and act prospectively only.[1] However, the statute by its own terms requires a permit of any development of or construction on any subdivided land "commencing" after September 23, 1971 regardless of when the land itself was subdivided within the meaning of 12 M.R.S.A. § 682.2.

(2) Selling any interest in subdivided land – It is important to note that Section 685-B.1.B. does *not* state that any person *creating* a subdivision need apply for a permit but rather that it states any person selling an interest in a subdivision[2] must apply for a permit. In other words, the emphasis in this portion of the statute is upon the act of sale of an interest in a subdivision rather than upon any act preparatory to sale, such as subdividing the land on paper by plat plan or metes and bounds description or physically subdividing the land by survey markers or roads. Thus regardless of how or when the land was subdivided, the sale of any interest in a subdivision must be preceded by the issuance of a permit by the Commission, when such sale occurs after September 23, 1971. To require a permit for sales prior to September 23, 1971 would violate the rule against retroactive application of statutes, without language to indicate otherwise.

(3) Offering to sell any interest in subdivided land – It is important to note that the word "commence" contained in Section 685-B.1.B. relates only to "development of or construction on" any subdivision. Hence, it is obvious that the legislative intent was not to exempt persons who commenced offering subdivided land for sale prior to September 23, 1971, from the requirement that such offering be preceded by a Commission permit. In addition, such a construction of this portion of the statute is consistent with the requirement of a permit preceding the actual sale of subdivided land.

Finally, I would note that while a permit may be required, each case must be evaluated on its own merits and whether or not a permit may be denied or issued with stringent conditions, in addition to being a function of the applicant's ability to meet the

1) *Dalton v. McLean,* 137 Me. 4, 14 A.2d 13 (1940).

2) Subdivision must be construed as relating to undeveloped land for it would serve absolutely no useful purpose to require a permit from the Commission to sell, for example, a house legally constructed on a portion of land which has been previously legally subdivided.

statutory criteria for approval, will also be a function of constitutional protections of vested interests.

E. STEPHEN MURRAY
Assistant Attorney General

August 1, 1972
Environmental Protection

Henry E. Warren

Effect of Failure to Comply with Time Limits.

SYLLABUS:

Failure of the Board of Environmental Protection to comply with time limits for decision making does not divest the Board of its jurisdiction to make such decisions.

FACTS:

Various statutes defining the authority of the Department of Environmental Protection require the Board to render decisions within specified periods of time. Those statutes include Title 38 §§483, 484, 590, 593 and Title 12 §4802.

The burden of work and delay in preparation of transcripts by the official reporters apparently causes great difficulty in meeting such deadlines.

QUESTION:

Does the failure of the Department of Environmental Protection to issue an order or make a decision within the time limit as specified divest the Board of jurisdiction or render its decision unenforceable?

ANSWER:

No.

REASONING:

Statutes which require the performance of an act in a certain fashion or by a certain time and which attach no penalties for failure to so act are termed "directory." On the other hand, statutes which impose conditions for failure to act within a specified time period are termed "mandatory." The distinction rests on the consequences which result from the action or non-action. 82 *C.J.S.*, Statutes, § 379. In general, a statute with a mandatory time provision will provide that if the official fails to act within the time specified then that failure to act will have the same effect as if the official had made a particular decision. See for example 30 M.R.S.A. § 1953(5) which provides that failure of the Attorney General to approve an interlocal cooperation agreement "within 30 days of its submission shall constitute approval thereof."

None of the statutes defining the authority of the Department of Environmental

Protection attach consequences should the Board fail to act within the time specified. Nor do such statutes indicate which, if any, result would be deemed to occur from a delay. One could just as easily assume that a delay constituted an approval as a disapproval of an application. We must conclude therefore that the time provisions in question are directory and not mandatory. Failure of the Board to issue an order or render a decision within the required statutory time period does not mean that the Board has either approved or disapproved of the application pending before it. The Board retains its authority to render a decision even though it did not act within the time period specified. It cannot be prevented from rendering or enforcing such decision. See e.g., *Liberty Mutual Ins. Co. v. Industrial Accident Commission,* 42 Cal. Rptr. 58 (1964); *Koehn v. State Board of Equalization,* 333 P.2d 125 (Cal. 1959); *Superior Oil Co. v. Foote,* 214 Miss. 857, 59 So.2d 85 (1952).

Having decided that a failure to act as promptly as directed is not fatal to the Board's jurisdiction, we must add a caveat. Failure to act as promptly as required could result in a party applying for and obtaining a mandatory injunction requiring the Board to act. Also such decision could be voidable for being based on a stale record. 2 *Am. Jur.2d,* Administrative Law, § 687. Absent particular facts, it is impossible to predict how long a delay would render a record stale and the evidence insufficient to support a determination. The Board would be well advised to avoid, to the maximum extent possible, any delay in meeting its statutory deadlines.

JOHN M. R. PATERSON
Assistant Attorney General

August 10, 1972
Banks & Banking

Robert A. Brown, Acting Bank Commissioner

Authority of Bank Commissioner to declare moratorium on formation of new banking institutions.

SYLLABUS:

The Maine Bank Commissioner does not have the authority to declare a general moratorium on the formation of new banking institutions in the State.

FACTS:

None.

QUESTIONS:

(1) Does the Bank Commissioner have the authority to declare a general moratorium with regard to the formation of new banking institutions within the State of Maine?

(2) Would such a moratorium prevent the formation of a financial institution by Federal charter?

(3) Would such a moratorium be considered a "restraint of trade"?

ANSWERS:

(1) No.
(2) and (3). The answer to question 1 obviates answers to questions 2 and 3.

REASONS:

There appears to be no provision in the Maine Banking Laws (Title 9, Maine Revised Statutes) which gives to the Bank Commissioner the authority to declare, for whatever reason, a general statewide moratorium on the formation of new banking institutions.

CRAIG H. NELSON
Assistant Attorney General

August 11, 1972
Retirement

W. G. Blodgett, Assistant Executive Director

Retirement – Deduction of Workmen's Compensation from Retirement Allowance of Participating Local District Employee.

SYLLABUS:

An occupational disability retirement allowance payment by the Maine State Retirement System to an employee of a participating local district cannot be reduced by the amount of the workmen's compensation payment being made to such employee under coverage provided by that district.

FACTS:

A fireman was employed by the Town of Brunswick, which is a participating local district in the Maine State Retirement System. On February 21, 1971, the Maine State Retirement System granted him an occupational disability retirement allowance. The fireman also received an allowance of workmen's compensation for that disability under coverage provided by the Town of Brunswick. The Maine State Retirement System reduced the retirement allowance payment by the amount of the workmen's compensation payment which the fireman was receiving, on the assumption that such reduction was required by 5 M.R.S.A. § 1122, sub-section 5, when viewed in light of 5 M.R.S.A. § 1092, subsection 8.

QUESTION:

Whether an occupational disability retirement allowance payment by the Maine State Retirement System to an employee of a participating local district may be reduced by the amount of the workmen's compensation payment being made to such employee under coverage being provided by the participating local district?

ANSWER:

No.

REASONS:

5 M.R.S.A. § 1122, subsection 5 states:

"5. Disability payments under other laws. Any amounts which may be paid or payable by the State under any workmen's compensation or similar law except amounts which may be paid or payable under Title 39, section 56, to or on account of any member or retired member on account of any disability shall be offset against the amount of any retirement allowance payable under this section on account of the same disability."

5 M.R.S.A. § 1092, subsection 8 states:

"8. Benefits as if State employees. Employees who become members under this section and on behalf of whom contributions are paid as provided in this section shall be entitled to benefits under the retirement system for which such contributions are made as though they were state employees."

It appears from 5 M.R.S.A. § 1092, subsection 8, that participating local district employees "shall be entitled to benefits under the retirement system . . . as though they were state employees." This seems to mandate equal benefit treatment for all members of the retirement system, regardless of status as a State employee or a participating local district employee.

It appears from 5 M.R.S.A. § 1122, subsection 5, that a retirement benefit must be reduced by any workmen's compensation payment "paid or payable by the State." Workmen's compensation payments provided by a participating local district are *not* "amounts – paid or payable by the State . . . . " Hence, it appears from 5 M.R.S.A. § 1122, subsection 5, that a State employee who receives a workmen's compensation payment will not receive retirement benefit treatment equal to a participating local district employee.

It seems that 5 M.R.S.A. § 1092, subsection 8 is in direct conflict with 5 M.R.S.A. § 1122, subsection 5. However, the Legislature is supposed to have a consistent design of policy and to intend nothing inconsistent or incongruous. *Whorff v. Johnson,* 143 Me. 198. Statutes in pari materia are to be construed together so as to carry out the legislative will. *Stuart v. Chapman,* 104 Me. 17; *Morton v. Hayden,* 154 Me. 6; *Palmer v. Inhabitants of Town of Sumner,* 133 Me. 337; and sections 4703, 4704, and 4706, *Sutherland on Statutory Construction,* 3rd. Edition.

" * * * A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." *Sutherland,* p. 339, § 4705.

With these principles in mind, let us re-examine 5 M.R.S.A. § 1092, subsection 8 and 5 M.R.S.A. § 1122, subsection 5. It seems that the subject of 5 M.R.S.A. § 1092, subsection 8, is the computation of retirement benefit entitlement; in that connection, the Legislature has decreed that all members of the retirement system shall be treated the same. It appears that the subject of 5 M.R.S.A. § 1122, subsection 5 is the offsetting of certain other benefits against the payment of the retirement benefit; in that connection, the Legislature has decreed that any workmen's compensation benefit which is "paid or payable by the State" shall be offset against retirement allowance payable. Thus, the first deals with computation of entitlement to retirement benefit, and the second deals with certain offsetting against the retirement allowance to be paid; there must be equal treatment as to the first but not as to the second.

This construction gives effect to both sections. Furthermore, it seems to be required

by the explicit language in 5 M.R.S.A. § 1122, subsection 5. The definitive treatment in such specific and unambiguous words in this latter section must be viewed as creating a limitation on the general provision in 5 M.R.S.A. § 1092, subsection 8.

CHARLES R. LAROUCHE
Assistant Attorney General

September 8, 1972
Educational & Cultural Services

Asa A. Gordon, Assoc. Comm., Educ. Mgmt. Res.

Fluoridation of Individual School Water Supplies

SYLLABUS:

A local public school committee or board of directors may accept a gift of a fluoridation system for the water supply used in a school building. However, the committee or board may not, in the absence of prior approval of the municipality or municipalities served by the public school, authorize the operation of such a system.

FACTS:

The State Department of Health and Welfare has available approximately $20,000.00 in Federal Funds which it desires to donate to various school officials to be utilized to provide fluoridation systems in their respective public schools. There are 20 prospective donee schools, none of which is served by a municipal water supply.

QUESTION 1:

May a local school committee or board of directors accept a gift of a fluoridation system for the water supply used in a school building?

ANSWER TO QUESTION 1:

Yes.

QUESTION 2:

May a local school committee, in the absence of prior approval of the municipality or municipalities served by the public school, authorize the operation of a fluoridation system for the water supply used in a school building?

ANSWER TO QUESTION 2:

No.

REASONS:

There is nothing in the laws of the State which would prohibit a local public school committee or board of directors from accepting a gift of a fluoridation system for the

water supply used in a school building. Title 20 M.R.S.A. § 308 provides School Administrative Districts with broad authority to accept and receive gifts of this nature. That statute provides, in pertinent part:

> "1. *Outright or in trust.* A School Administrative District may accept and receive money or other property, outright or in trust, for any specified benevolent or educational purpose."

A more difficult question is raised concerning whether local officials have the power and authority to independently decide to add fluoride to the school's water supply, or whether they must first secure approval for such fluoridation from the municipality or municipalities served by the school.

22 M.R.S.A. § 2434, entitled "Fluoridation" and § 2435, entitled "Authorizations," respectively, provide, in pertinent part:

> "No public utility *or other agency operating a public water supply* shall add any fluoride to such water supply without approval of the department [of Health and Welfare]. The department is authorized to make such rules and regulations as it deems necessary to carry out this section.
>
> "No such public utility *or agency* shall add any fluoride to *any such water supply* without first having been authorized to do so by the municipality or municipalities served by it . . . " (Emphasis supplied)

The phrases "or other agency operating a public water supply" and "public water supply" are nowhere defined in the statutes, the Rules and Regulations promulgated by the Department of Health and Welfare pursuant to 22 M.R.S.A. §2434 or the case law. Nor does the legislative history of these provisions aid in the interpretation thereof. Accordingly, we must look to the objects and purpose of the legislation under consideration to construe the meaning of these phrases.

One of the questions which we must resolve is whether the phrase "other agency operating a public water supply" as used in the statute, embraces public schools which secure their water from sources other than a municipal water system, or whether such schools are beyond the scope of the statute. For the reasons which follow, in our opinion, public schools are required to comply with the statute.

"Agency operating a public water supply" may mean either a public agency, or an agency, public or private, which supplies water to the public. If the former interpretation is given to this language, it would clearly include those public schools which secure their water from sources other than a municipal water system, because such schools are, *ipso facto,* public institutions.

In order to determine whether the latter interpretation of the phrase would include public schools having their own water supplies, we must first address ourselves to the meaning of the phrase "public water supply." As used in the statutes, is the phrase "public water supply" limited to the public at large or general public, or does it also include particular segments of the public such as school children? For the reasons which follow, we feel that the phrase is not limited to the general public only, but also includes certain particular segments of the public such as school children.

In our opinion, the philosophy behind the legislative scheme is to leave it up to the various municipalities to determine for themselves whether or not to fluoridate their water. This purpose would be substantially, if not entirely, undercut if all school children of a particular municipality were to be subjected to fluoridated water on a daily basis, even though the community as a whole disapproved of fluoridation. If the legislature intended school boards to have the power to fluoridate the water used in their respective schools, it could have expressly so provided.

Accordingly, on either interpretation of the language "other agency operating a public

water supply," local schools maintaining their own sources of water are within the meaning of the phrase, are subject to the statute, and must, therefore, secure the approval of the municipality or municipalities served by the school, before they may lawfully permit the fluoridation of the water used in the school.

MARTIN L. WILK
Assistant Attorney General

September 7, 1972
Personnel

Nicholas L. Caraganis, Director

Classified State Employees – Duel Employment – Executive Director, Maine Municipal Bond Bank – Clarification of Rule 5.2 (d) of the Personnel Law and Rules.

SYLLABUS:

A full-time classified State employee is not prohibited from assuming the position of, and receiving compensation for acting as, Executive Director, Maine Municipal Bond Bank, while continuing to maintain his or her present full-time classified position, provided that the position of Executive Director is not incompatible with, and does not directly or indirectly interfere with, the proper exercise and performance of the employee's present duties and responsibilities. Rule 5.2 (d) of the Personnel Law and Rules, under certain circumstances limits the amount of compensation a classified employee may receive from the State, but does not apply where the State has by statute otherwise provided for the payment of a State employee's compensation, or where such compensation relates to a position in State service wholly unrelated to the employee's present position.

FACTS:

At a Special Session of the State Legislature in 1972, a Bill was enacted entitled "Maine Municipal Bond Bank Act." Section 5164 of the Act (30 M.R.S.A. §§ 5161, *et seq.)* declares that "the bank is constituted as an instrumentality of the State exercising public and essential governmental functions," and that the exercise by the bank of the powers conferred upon it "shall be deemed and held to be an essential governmental function of the State."

The Act further provides that the bank's board of commissioners "shall appoint an executive director who shall also serve as both secretary and treasurer" and that the board of commissioners "shall fix the duties and compensation of the executive director."

We are informed that the compensation of the Executive Director will be $5,000.00 per annum. We are further informed that the Executive Director's duties will initially entail acquainting municipal officials with the purposes of the Maine Municipal Bond Bank and thereafter involve assisting these officials in the preparation and submission of loan applications. We have been advised that the initial contact work (which should be completed in approximately six months) will be undertaken during the evening after

normal working hours, and possibly on weekends, and that even less time will be required on the part of the Executive Director after the initial contacts have been made. We have not been told when or where the Executive Director will perform these latter duties.

The Director of the State Department of Personnel has inquired whether it is permissible for a full-time classified State employee to assume the position and duties of Executive Director of the Municipal Bond Bank and receive compensation therefor while, at the same time, such employee continues to maintain his present full-time classified position as Deputy State Treasurer.

We have specifically been asked to construe Rule 5.2 (d) of the Personnel Law and Rules relating to compensation for State Classified Employees. The Personnel Board has heretofore taken the position that this rule prohibits a classified employee from receiving dual compensation from the State.

QUESTION:

May a full-time classified State employee lawfully assume the position of Executive Director of the Maine Municipal Bond Bank and receive compensation therefor while, at the same time, continuing to maintain his or her present full-time classified position?

ANSWER:

Yes, provided that the position is not incompatible with and does not interfere with the proper exercise and a faithful performance of the employee's present duties and responsibilities.

REASONS:

There is nothing in the Personnel Law and Rules (effective January 1, 1963) which expressly prohibits a full-time classified employee from undertaking additional employment either within or outside of State Government. The rules provide only that a full-time employee is " . . . normally expected to work at least the standard work week (40 hours) for the class or agency." Rule 1.3 (9) of the Personnel Law and Rules. The employee is not required under the rules to devote his or her entire time to the position. See *State v. Hinshaw,* 198 N.W. 634, 197 Iowa 1265 (Supreme Ct. 1924).

While Rule 5.2 (d) of the Personnel Law and Rules does, under certain circumstances, impose a limitation on the remuneration which an employee may receive from the State, it is our opinion that such limitation does not apply to a full-time classified State employee who otherwise may properly assume the position of Executive Director of the Municipal Bond Bank.*

Rule 5.2 (d) "Total Remuneration" provides, in pertinent part:

> "Any salary paid to an employee in the classified service shall represent the total remuneration for the employee, not including reimbursements for official travel. *Except as otherwise provided* no employee shall receive pay from the state in addition to the salary authorized under the schedules provided in the pay plan for services rendered by him either in the discharge of his ordinary duties or any additional duties which may be imposed upon him or which he may undertake or volunteer to perform." (Emphasis supplied.)

It is our opinion that the State has, by virtue of 20 M.R.S.A. § 5164, "otherwise provided" the extent to which an employee may be compensated by the State. That

* For purposes of this opinion, we are assuming that the State shall be paying the executive director's salary.

statute specifically provides, without stating any upper or lower limits and without reference to any other statutory limitations, that the bond bank's board of commissioners "shall fix the compensation of the executive director."

In addition, we construe Rule 5.2 (d) as merely limiting the amount of compensation a classified employee may receive for any *one* position in State service and the performance of the duties and responsibilities reasonably related thereto, and not as prohibiting a classified employee from receiving additional compensation from the State in consideration of the proper performance of additional services which are wholly unrelated to, and beyond the scope of, his or her present position. In the absence of any provision in the Personnel Law and Rules or elsewhere expressly prohibiting a classified employee from assuming more than one position in State service, we feel that it would be unreasonable and inequitable to deny such an employee additional compensation from the State for the proper and faithful performance of such additional duties.

Notwithstanding the foregoing, a classified State employee may not properly undertake an additional position beyond the scope of his present duties and responsibilities if the two positions are incompatible, are likely to present conflicts, or may otherwise directly or indirectly interfere with the proper performance of the employee's present duties and responsibilities. *Howard v. Harrington,* 114 Me. 443 (1916); *Report of the Attorney General,* 1953-54, p. 83. See also, *Coleman v. Lee,* 121 P.2d 433, 58 Ariz. 506 (Supreme Ct. 1942).

In *Howard v. Harrington, supra,* the Maine Supreme Court recited certain well established tests to be applied in determining whether or not two offices are incompatible. These tests may be summarized as follows:

(1) Whether the holder may in every instance discharge the duties of each;

(2) Whether the duties and responsibilities of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both;

(3) Whether any inconsistency exists in the functions of the two offices.

It is also important to note that in the State of Maine two positions within different branches of the government, are, *ipso jure,* incompatible. Article III of the State Constitution divides the government into three distinct departments, the legislative, executive and judicial, and explicitly prohibits any person belonging to one department from exercising any of the powers properly belonging to either of the other departments.

Applying the foregoing tests to the instant situation, and based upon the information which we have been furnished, it is our opinion that the position of Executive Director of the Maine Municipal Bond Bank is not inherently incompatible with the position of Deputy State Treasurer. There is nothing in the Maine Municipal Bond Bank Act (30 M.R.S.A.§§5161, *et seq.)* or in the statutes pertaining to the office of Deputy State Treasurer (5 M.R.S.A. § 121) which renders the two positions incompatible. The two positions are not within different departments of State. And, since it appears that the Deputy State Treasurer will initially be able to properly exercise the duties of Executive Director of the Bond Bank during evenings after normal working hours and on weekends, and thereafter without expending substantial amounts of time, the second position need not necessarily interfere with or detract from the Deputy State Treasurer's absolute duty to continue to devote full time and proper attention to his present position.

We hasten to point out that our opinion is predicated upon the facts as they have been presented to us and as we have described them above. We note that the Commissioners of the Bond Bank have the power to fix the duties and compensation of the Executive Director, and should the Executive Director be charged with duties and responsibilities more extensive or involving more time than those described above, our opinion may well

be different.

We further wish to make it absolutely clear that we do not, by this opinion, intend to sanction any activities on the part of the Deputy State Treasurer which directly or indirectly detract from the full and proper performance of his present duties. If, for example, the additional burdens of the new position, in terms of time or energy, directly or indirectly were to result in decreased efficiency below acceptable standards, or otherwise materially affect the proper performance of his present duties, we would conclude that the second position interfered with the first, and should not be undertaken or should immediately be discontinued.

MARTIN L. WILK
Assistant Attorney General

September 15, 1972

Dean Fisher, M.D. Commissioner,

Educational Responsibility of the State for Financing Maintenance and Tutoring of Blind Children

SYLLABUS:

a) Neither the State nor local government is required to pay maintenance of blind children attending private boarding schools.

b) Whether the administrative unit is required to pay for tutorial services at public schools and/or resource setting depends upon the purpose for which the services are offered.

FACTS:

For the past ten years the Division of Eye Care, which obtains federal funds for its vocational rehabilitation program under the authority of the Federal Vocational Rehabilitation Act, has been paying maintenance charges on those children enrolled in grades seven through twelve at Perkins School for the Blind with Federal Vocational Rehabilitation funds (80% federal, 20% state). The tuition charges were paid with 100% state funds. The Division of Eye Care has also been paying private tutoring charges for children in this same age group with vocational rehabilitation funds in a public school and/or resource setting. The rational behind this practice was that tuition charges were the responsibility of the state and maintenance and tutoring charges were not clearly defined as such under 22 M.R.S.A. 3502 (supp.). The Federal Regional Office has recently questioned this practice.

QUESTION:

a. Is the Maine State and/or local government required to pay for maintenance of blind students at private schools?

b. Is the Maine State and/or local government required to pay for tutorial services for its blind students at public schools?

ANSWER:

a. No.

b. Whether the Maine State and/or local government is required to pay for tutorial services at public schools or resource settings depends upon the purpose for which the tutoring is offered.

REASONS:

(a) It is generally recognized that the State educational system is responsible for providing education through the high school level. This responsibility embraces general education, 20 M.R.S.A. 851-856 and 20 M.R.S.A. 1281-2195; vocational education, 20 M.R.S.A. 2351; and special education, 20 M.R.S.A. 3111-3116. Legislation has also been enacted specifically referring to education of blind children, 22 M.R.S.A. 3502 (Supp.). In order to determine whether the State and local governments are financially responsible for supporting blind children at private schools and for tutoring of blind children at public schools it is necessary to review these provisions.

The purpose of the legislation specifically governing the education of blind children 22 M.R.S.A. 3502 (Supp.) is limited. It authorized the Department of Health and Welfare to send a blind child to any school qualified to provide suitable education for the blind child. All of the powers conferred by this enabling legislation are discretionary.

The statutory provisions of 22 M.R.S.A. 3502 (Supp.) are as follows:

> Upon request, and with the approval of the parents or guardians, the Department may send such blind children as it may deem fit subjects for any length of time in the discretion of the Department but not beyond the time when said child has reached its 21st birthday, to any school considered by the Department to be qualified to provide suitable education for the blind child. In the exercise of the discretionary power conferred by this section, no distinction shall be made on account of the wealth or poverty of the parents or guardians of such children. The sums necessary for the support and instruction of such pupils in such school, including all traveling expenses of such pupils may be paid by the State. Nothing herein contained shall be held to prevent the Department of Health and Welfare from securing whole or partial payment of such sums from the parents or guardians of such pupils or from local school systems. Nothing herein contained shall be held to prevent the voluntary payment of the whole or any part of such sums by the parents or guardians of such pupils," 22 M.R.S.A. 3502 (Supp.).

To interpret this statute as conferring a discretionary power upon the Department is consistent with the general rule that the word "may" in a statute is permissive and not mandatory. In *Collins v. State,* Me., 263 A.2d 835 (1965) the rule is stated as follows:

> In general, the word "may", used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the Statute, and when used in a statute is permissive, discretionary, and not mandatory. *Roy v. Bladen School District No. R-31* of *Webster County,* 165 Neb. 170, 84 N.W. 2d 119, 124 (1957).
>
> See also *Dumont v. Speers,* Mr., 245 A.2d 151 (1968).

The legislature made manifest its intent that the State's financial responsibility for support, instruction, and travel is to be discretionary by amending 22 M.R.S.A. 3502 (Supp.) as part of "An Act to Appropriate Money for the Expenditures of State Government" 1971, c 91 (P. & S.L.), Section E, effective July 1, 1971. This amendment consisted of substituting the word "may" for "shall" in the third sentence of 22 M.R.S.A. 3502 (Supp.). The fact that the legislature deliberately changed the word

"shall" to "may" is very significant, and clearly negates the existence of a legislative intent that the State is compelled by this statute to pay for support. See *State v. Yelle*, 52 Wash. 158, 324 P.2d 247, 249 (1958).

Another amendment to 22 M.R.S.A. 3502 (Supp.) added the fourth sentence. This sentence authorizes the Department of Health and Welfare to secure payment for support from the parents or the local school systems. In interpreting this provision it seems clear that the language "Nothing . . shall be held to prevent . . " is intended as a rule of construction. It requires that the chapter be construed to authorize the Department to secure payment from the parents or administrative units at its discretion. The sentence does not require that the Department secure such payment nor does it require that the parents or the administrative unit pay for such services. If the legislature had intended to impose the obligation for payment of board and maintenance of handicapped children upon either the administrative unit or the parents, the statute would expressly state that such an obligation exists. In the absence of an express provision in 22 M.R.S.A. 3502, any financial responsibility placed upon the State or administrative unit must be found under the general education and special education provisions of the statutes. The applicable sections are discussed below.

In reviewing the provisions relating to board there is a general section which authorizes the administrative unit to raise sums for board at secondary schools.

> Any administrative unit may in addition to the sums raised for the support of high and public schools, raise and appropriate a sum for the payment of conveyance or board of pupils attending secondary schools, said sum to be expended under the direction of the superintending school committee . . . 20 M.R.S.A. 1285 (Supp.)

The powers conferred by this section are permissive and not obligatory. The legislature has indicated by utilizing the word "may" that the determination of whether to raise and appropriate funds is discretionary. See *Collins v. State (Supra).* Also, any determination of how to spend the amount raised and appropriated is left to the discretion of the superintending school committee. The committee is not obligated to pay board of pupils attending secondary schools. If the Legislature had intended to impose the obligation for payment of board and maintenance of handicapped children upon either the State or administrative unit, a specific provision would have been enacted. Legislation has been enacted requiring the administrative unit to pay board for pupils in specific situations and authorizing the State to reimburse the unit. See sections 20 M.R.S.A. 1291 (Supp.), 20 M.R.S.A. 1292 (Supp.), 20 M.R.S.A. 862, 20 M.R.S.A. 1453, 20 M.R.S.A. 1454 and 20 M.R.S.A. 3731-3732 (Supp.). However, none of these sections require the administrative unit or the State to pay for board or maintenance of handicapped children. Because the obligation to pay board has been imposed in specific instances, the absence of a provision specifically requiring the unit to pay board for handicapped children implies that the legislature did not intend that the unit be required to pay.

(b) The second issue involves determining whether tutorial services provided in a public school or resource setting are the State's and/or the administrative units' educational responsibility.

For the reasons previously discussed with reference to maintenance, 22 M.R.S.A. 3502 (Supp.) does not require that the State or the administrative unit pay for tutoring. The sections devoted to the general powers and duties of the administrative unit, 20 M.R.S.A. 851-862 and 20 M.R.S.A. 1281-1295, do not specifically refer to tutorial services. However, the provisions in 20 M.R.S.A. 3111-3118 make the administrative unit financially responsible for tutoring of handicapped children. The primary purpose for which the tutoring is offered determines whether or not the State or local

government is financially responsible.

> "It is declared to be the policy of the State to provide within practical limits, equal educational opportunities for all children in Maine able to benefit from an instructional program approved by the state board. The purpose of this chapter is to provide educational facilities, services and equipment for all handicapped or exceptional children below 20 years of age who cannot be adequately *taught with safety and benefit in the regular public school classes of normal children or who can attend regular classes beneficially if special services are provided*" . . . (emphasis added) 20 M.R.S.A. 3111 (Supp.).
>
> "Special services" shall be transportation; *tutoring;* corrective teaching . . . ; and provision of special seats, books and teaching supplies and equipment required for the instruction of handicapped or exceptional children. 20 M.R.S.A. 3112 (2). (emphasis added)
>
> Every administrative unit is responsible for appropriating sufficient funds to provide for the education of handicapped or exceptional children. This appropriation is to be expended for programs of special education at either the elementary or secondary level under the supervision of the superintending school committee or school directors or for programs approved by the commissioner . . . 20 M.R.S.A. 3116 (Supp.) (emphasis added)

The state is authorized to reimburse the administrative unit 20 M.R.S.A. 3731 and 3732.

It is clear that these sections make the administrative unit responsible for appropriating and expending funds for the education of handicapped children who cannot be taught with safety and benefit in the regular public school classes of normal children or who can attend regular classes benefically if tutoring and other special services are provided. These sections do not authorize the administrative unit to appropriate and expend funds for tutorial services in public schools or resource settings if the purpose of the tutoring is for the vocational rehabilitation of handicapped children. As a corollary the State vocational rehabilitation agency is not precluded from financing services such as educational or training resources with vocational rehabilitation funds if their primary purpose is to assist in the rehabilitation of the disabled and is not that of some other function of State or local government. (See letter dated October 1, 1963 from Joseph Hunt, Assistant Commissioner, Department of Health, Education and Welfare, Boston Regional Office, to Mr. H. Kennebt McCollam, Director, Board of Education and Services for the Blind, Hartford, Connecticut).

Determining whether the purpose is part of the education program or part of the vocational rehabilitation program is frequently difficult. However, this determination is necessary in order to decide whether the administrative unit is financially responsible for tutoring. The following example was provided in the letter from Joseph Hunt, *supra.*

> For instance, adjustment centers for the blind may include in their programs of services some which partake of the nature of special education such as instruction in braille. In such an instance, braille instruction at an adjustment center is part of the cluster of rehabilitation services which together with the others is specifically designed to be part of the totality of services needed in the rehabilitation of the blind. On the other hand, braille instruction which is part of the high school curriculum would be considered part educational system and not subject to Federal financial' participation from vocational rehabilitation funds, except in unusual circumstances such as that of an adult newly blinded individual who is not already enrolled in high school and would not receive instruction under educational auspeces except as a rehabilitation client.

September 25, 1972
Insurance

Harold E. Trahey, First Deputy Comm.

Variable Benefit Contracts

SYLLABUS:

A separate account rider on a group annuity contract which provides for guaranteed, fixed employee benefit payments and variable employer contribution payments does not constitute a variable benefit contract which must be authorized under 24-A M.R.S.A. § 2537, subsection 6.

FACTS:

It appears that an insurance company plans to issue a separate account rider for a group annuity contract. The payments to the employees under this group annuity contract are in guaranteed, fixed amounts as pension payments to employees upon their retirement. This rider would enable the employer to allocate any part of the total contribution to a separate account for equity investments. The employer can withdraw any amounts of money from the separate account and put it into the general fund to purchase the annuity or to pay the benefits to the employees. If the investment experience of the separate account is favorable, total amounts paid in by the employer upon the group annuity contract or to the separate account may decrease so long as there are sufficient funds to purchase the annuities at the guaranteed rate or to provide the employee benefits as required by the plan.

QUESTION:

Does a separate account rider on a group annuity contract which provides for guaranteed, fixed employee benefit payments and variable employer contribution payments constitute a variable benefit contract requiring authorization under 24-A M.R.S.A. § 2537, subsection 6?

ANSWER:

No.

REASONS:

24-A M.R.S.A. § 2537, subsection 6, provides:

"No insurer shall deliver or issue for delivery within this State any contract or agreement providing benefits in variable amounts under this section unless it is . . . " authorized thereunder.

The real question presented is what does this statute mean by the phrase "benefits" provided by a contract issued by an insurer? It is clear from the facts presented that the purpose of the contract is to provide pension payments to employees upon their retirement. The intended beneficiaries of this contract are the employees. Since it is

undisputed that these pension payments are to be in guaranteed, fixed amounts, 24-A M.R.S.A. § 2537, subsection 6 would seem to be inapplicable; that Section applies only when the benefits under the contract are to be in *variable* amounts.

Nevertheless, it has been suggested that the separate account rider is a contract which provides a "benefit" to the employer, in that it provides a possible method whereby the employer can reduce his contribution payments under the basic contract, dependent upon the varying success of the separate account equity investment. However, it is clear that the Legislature could not have intended to include this within the meaning of the word "benefits" as used in 24-A M.R.S.A. § 2537, subsection 6. It is apparent that the statute refers to the *basic* contract – which contemplates the annuity payments – and to the *ultimate* beneficiary of that contract – the retired employee.

24-A M.R.S.A. § 2537, subsection 1 unequivocally establishes this to be the correct meaning of the word "benefits." That section reads:

> "Any domestic insurer may establish one or more separate accounts, including that type known as a unit investment trust, as defined by the Investment Company Act of 1940, Stat. 789, 15 U.S.C. § 80A, et seq., as amended, and may allocate to such separate accounts, in accordance with the terms of a written contract or agreement or annuity or pension, profit-sharing or retirement plan, whether or not qualified under the applicable provisions of the Internal Revenue Code, 68A Stat. 1, 26 U.S.C. § 1, et. seq., as amended, with any individual or any group, any amounts paid or remitted to or held by the insurer which are to be applied to provide for *annuities or other benefits payable in fixed and guaranteed or variable dollar amounts, or both.*" (Emphasis supplied.)

The phrase "annuities or other benefits payable" plainly refers to the ultimate payment to the ultimate beneficiary – the retired employee.

The express recognition in 24-A M.R.S.A. § 2537, subsection 1 that a separate account contract can provide for either fixed or variable benefits also reveals that the Legislature could not have intended the word "benefits" to refer to the possible favorable results which might enure to the employer from the investment experience of the separate account; by its very nature, the anticipated result from an equity account cannot be deemed to be "fixed and guaranteed." This construction is further indicated by the opening phrase in 24-A M.R.S.A. § 2537, subsection 5, which reads:

> "If the contract or agreement provides for *payment of benefits* in variable amounts, . . . "

The possible appreciation in an equity account cannot be deemed as a "payment of benefits" provided by contract.

Accordingly, it is clear that the word "benefits" does not refer to the possible equity appreciation in the separate account, and that such word refers to the annuity payments to the retired employee, which payments – "benefits" – are to be "fixed and guaranteed." Therefore, the contract to be issued by the insurer does not provide for "benefits in variable amounts" and subsection 6 of 24-A M.R.S.A. § 2537 is inapplicable to such a contract.

CHARLES R. LAROUCHE
Assistant Attorney General

October 2, 1972
Indian Affairs

John Stevens, Commissioner

Appropriating Funds to Support an Office for Governors' Interstate Council

SYLLABUS:

Public funds may not be appropriated for general use by the Governors' Interstate Indian Council, Inc., a private Minnesota corporation, not organized by Act of a State Legislature, because there is no assurance that such appropriation would be for a public purpose.

FACTS:

The Governors' Interstate Indian Council (a voluntary organization consisting of representatives from several states having Indian population in which Maine has participated for the past 25 years) proposes to organize a corporation to implement its policies. We are informed that Articles of Incorporation for such corporation have been filed in the State of Minnesota and that a Certificate of Incorporation has been issued by the Minnesota Secretary of State. A copy of the Articles of Incorporation are annexed hereto.

We are further informed that a proposal has been made that each state participating in the Governors' Interstate Indian Council appropriate funds for general use by the corporation (specifically the funds are to be used to pay the corporation's office overhead and salary expenses). Under the proposal, the relative size of each state's appropriation would be computed by pro-rating the total amount required by the corporation to fund its operations among each participating state in the ratio which a state's total Indian population bears to the combined total Indian population of all participating states.

We are advised that the total proposed budget for fiscal 1973 is $60,000 and $91,000 for fiscal 1974.

The Commissioner of the Department of Indian Affairs has requested our opinion whether the State may lawfully appropriate its public funds for general use by the Governors' Interstate Indian Council, Inc.

QUESTION:

May the State lawfully appropriate public funds for general use by the Governors' Interstate Indian Council, Inc.?

ANSWER:

No.

REASONS:

The law is well settled that public funds may not be appropriated for private purposes;

public funds may properly be appropriated only for the benefit of the public. *State Constitution,* Article IV, Part Third, 1. *State v. Stinson Canning Company,* 320 Me. 161, 211 A.2d 553 (1965); *State v. Vahlsing,* 147 Me. 417, 88 A.2d 144 (1952). This does not mean that the appropriation must benefit all segments of the public equally, or that the legislature is absolutely precluded from appropriating money for private individuals or for particular classes of individuals. As stated by Mr. Justice Marden in *State v. Stinson Canning Company, supra* (at page 324):

> "Whenever it is apparent from the scope of the Act that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the Act will be upheld even though incidental advantage may accrue to individuals beyond those enjoyed by the general public."

Examples of the kinds of expenditures which have been deemed to be for a public purpose follow, namely: Expenses of government, promotion of patriotism, erection of memorials and veterans' halls, veterans' benefits, housing, moral obligations and claims, promotion of private enterprise, unemployment relief, disaster relief, urban development, public fairs and exhibitions. See generally, 63 *Am. Jur. 2d* "Public Funds", §§58-82, pp. 446-469.

In the instant case, there is nothing in the Articles of Incorporation which expressly declares that the Governors' Interstate Indian Council, Inc. is for a public purpose. There is no indication that the corporation (a private corporation) has been organized to engage in the kinds of activities referred to above or any other activities in the nature of a public purpose. Indeed the Articles of Incorporation are so broad, that the corporation could engage in virtually any kind of corporate activity short of clearly illegal activities.

Article I provides in general language that "the purposes of this corporation shall be to promote the interests of the Indian People of the United States." Article IV (1) empowers the corporation "to do any and all acts and things necessary and proper to carry out the objectives and purposes of the corporation. Article X declares that the objects and purposes of the corporation are "solely to advance the positions of the Indians in the American society, and to strive to remove the obstacles to their advancement that are now existent in the society." These purposes, while undisputedly eleemosynary and laudible in nature, do not necessarily have as their end the benefit of the public as required for purposes of public expenditures. Such corporate purposes could, as well, be directed toward essentially private activities designed to further private purposes.

While we recognize that this State has on several occasions enacted legislation and appropriated public funds pertaining specifically to Indians residing in the State (e.g. 22 M.R.S.A.§§4701-4840; 20 M.R.S.A. §§ 2205-2210), in each of these situations the state has carefully deliniated the purpose for which the funds were to be expended, and the state has retained some element of control over the manner in which the funds were to be expended.

In the instant case, the proposed appropriation would go to an out-of-state private corporation which has evidently been organized pursuant to Minnesota's corporation laws, and has not been formed pursuant to the Act of a State Legislature. The State of Maine would have no control over the manner in which the funds are to be expended and would have no voice in the setting of corporate policy. While John Bailey, a Maine resident, is designated a member of the corporation's Board of Directors in Article II of the Articles of Incorporation, Mr. Bailey has no office in State government and is a free agent.

For the foregoing reasons, it is our opinion that it would not be proper for the State to appropriate its funds for general use by the private Minnesota corporation.

MARTIN L. WILK
Assistant Attorney General

October 4, 1972
Human Rights Commission

Robert Talbot, Executive Sec.

Interpretation, Maine Human Rights Act (Ch. 501 PL 1971)

SYLLABUS:

The Maine Human Rights Commission does not possess the power to issue subpoenas on its own pursuant to 5 M.R.S.A. §§ 4566, sub-§§(4) and (12) because those sections do not specifically confer such power upon the Commission.

FACTS:

5 M.R.S.A. § 4566 sets forth the powers and duties of the Maine Human Rights Commission. The section provides:

> "The Commission has the duty of investigating all conditions and practices within the State which allegedly detract from the enjoyment, by each inhabitant of the State, of full human rights and personal dignity. Without limiting the generality of the foregoing, it has the duty of investigating all forms of invidious discrimination, whether carried out legally or illegally, and whether by public agencies or private persons, excepting law enforcement agencies and courts of this State and the United States. Based on its investigations, it has the further duty to recommend measures calculated to promote the full enjoyment of human rights and personal dignity by all the inhabitants of this State.
>
> "To carry out these duties, the Commission shall have the power:
>
> * * * * *
>
> "4. Hearings. To hold hearings, administer oaths and to take the testimony of any person under oath. There shall be no executive privilege in such investigations and hearings, but law enforcement officers, prosecution officers and judges of this State and of the United States shall be privileged from compulsory testimony or production of documents before the commission. Such hearings and testimony may relate to general investigations concerning the effectiveness of this Act and the existence of practices of discrimination not prohibited by it, as well as to the investigations of other alleged infringements upon human rights and personal dignity. The Commission may make rules as to the administration of oaths, and the holding of preliminary and general investigations by panels of commissioners and by the executive secretary.
>
> * * * * *
>
> "12. Other acts. To do such other things as are set out in the other subchapters, and everything reasonably necessary to perform its duties under this Act."

The Human Rights Commission has inquired whether the foregoing provisions empower it to issue subpoenas ducas tecum and subpoenas ad testificandum on its own.

QUESTION:

Does the Maine Human Rights Commission possess the power to issue subpoenas on its own pursuant to 5 M.R.S.A. § 4566, sub-§ (4) and (12)?

ANSWER:

No.

REASONS:

The law is well settled that an administrative agency possesses no inherent power to issue subpoenas, but may only do so when expressly authorized by statute. Cooper, *State Administrative Law,* Vol. 1, Chapter X, Section 3, pp. 295-296, and cases cited therein; *Andrews v. Nevada State Board of Cosmetology,* 467 P. 2d 96 (Nevada Supreme Court 1970); *Donatelli Building Co. v. Cranson Loan Co.,* 140 A.2d 705, 87 R.I. 293 (1958). This general principle has been succinctly summarized by the Court in *Andrews, supra,* at pp. 96-97, as follows:

> "The Board is a state administrative agency created by the Legislature . . . . Its powers are limited to those powers specifically set forth in chapter 644. As an administrative agency the Board has no general or common law powers, but only such powers as have been conferred by law expressly or by implication . . . . Official powers of an administrative agency cannot be assumed by the agency . . . . There is no authority in chapter 644 giving the Board the power to issue subpoenas."

In the instant case the term "subpoena" does not appear anywhere in the statute pertaining to the Human Rights Commission. There are no penalties set forth for failure or refusal to testify before the Commission or for failure or refusal to produce documentary material at the request of the Commission.

While the Commission's investigatory powers are expressed in broad language, the legislature could have specifically provided the Commission with the power to require the attendance of witnesses and the production of documents, if it had intended the Commission to have such power. See e.g. subpoena power of Water and Air Environmental Improvement Commission, 38 M.R.S.A. § 586; subpoena power of Maine Housing Authority, 30 M.R.S.A. § 4651 (8). We conclude that by omitting any reference to subpoena power, the legislature has indicated its intention not to provide the Human Rights Commission with such power.

For the foregoing reasons, it is our opinion that the Maine Human Rights Commission does not possess the power to issue subpoenas on its own pursuant to 5 M.R.S.A. § 4456, sub-§§ (4) and (12).

MARTIN L. WILK
Assistant Attorney General

October 6, 1972
Parks & Recreation

Lawrence Stuart, Commissioner

Allagash Waterway – Realty Road

As I advised you last week, Jerry Matus has referred this question to the Environmental Protection Division of this office. Since our discussions last Spring regarding the position of the State on the proposed acquisition of the American Realty Road by the County Commissioners of Aroostook County, I have done some research in order that I might more fully advise you as to the options available. My evaluation is as follows:

FACTS:

The American Realty Road is a private way owned by seven land companies. The road runs from Ashland, Maine, to Daaquam, Quebec, Canada, and goes through the Allagash Wilderness Waterway. At the present time it is only a dirt and gravel road. That portion within the Waterway is owned by International Paper Company. On January 4, 1966, the County Commissioners of Aroostook County completed the last of the formalities under Title 23, M.R.S.A. § 4001, necessary to lay out the Realty Road as a public road. In late January, 1966, the land owners involved all filed suit in Superior Court appealing the decision of the County Commissioners. As of this date, those appeals are still pending. Shortly thereafter, February 3, 1966, the Governor signed the Allagash Wilderness Waterway Act, Title 12 M.R.S.A. § § 661-680, P.L. 1965, Chapter 496. Following the effective date of the Act, the Parks & Recreation Commission, the administrative body for the Waterway, acquired the land within the restricted zone in the vicinity of the Realty Road, but left the Road in private ownership.

QUESTIONS:

1. Can the Commission prevent the above eminent domain action which seeks to make the Realty Road a public way?
2. Can the Commission otherwise regulate the use of a public road within the Waterway?

ANSWERS:

1. No.
2. Yes.

REASONING:

1. The first sentence of § 671(2) reads: "Existing private roads within the Waterway shall remain privately owned as existing." This sentence is ambiguous and appears to be subject to two interpretations. The first interpretation would read the sentence as meaning that existing private roads shall not be taken from private ownership for public purposes. The second interpretation could read the sentence as being directed not to the issue of ownership, but rather of use. That is, the sentence would mean that privately

owned roads shall not be altered or relocated by the owner. The ambiguity of this provision and the lack of statutory history on this point would initially cause one to conclude that either interpretation was reasonable.

The report of the Interim Joint Committee on the Allagash – St. John Rivers prepared for the 102nd Legislature used slightly more precise language on this issue when it recommended creation of the Waterway. In that report the Committee recommended that "existing private roads within the Waterway would remain privately owned excepting that the Commission could direct the discontinuance or relocation of such portions of said private roads as lie within the restricted zone." The thrust of that language appears to have been directed toward ownership, not use. The Report of the Interim Committee was submitted to the Legislature at the beginning of the first Special Session and was the basis for the creation of the Waterway in that session.

Further examination of the purpose of the entire Act would lead me to conclude that the provision was designed not only to protect owners of private roads, but also to limit access to the Waterway via public roads. Obviously, state and county roads running through the Waterway would destroy or seriously impair the character and purpose of the Waterway. It seems logical, therefore, to conclude that the Legislature desired to prohibit new public roads into and through the Waterway. The legislators were probably aware that existing private roads would likely carry less people to the heart of the Waterway than public roads. The whole purpose of the Act is to preserve the Waterway as a wilderness area. Public roads would obviously be inconsistent with that purpose.

Furthermore, the Legislature is assumed to have known the conditions to which the Act would apply. Except to the extent discussed below, at the time of creation of the Waterway no public roads existed in the area. All the roads were privately owned. As to all such existing private roads, the Legislature determined that they should remain private. Public roads, presumably new ones, would be subject to complete regulation and approval by the Commission under §§666(2) and 671(1) of the Act. It should be noted that § 671(2) specifically provides for a method by which private roads could be relocated. Since there is no similar provision for public roads, we can probably conclude that the Legislature (1) knew that no such roads existed and therefore such procedure was not required and (2) anticipated that no public roads would be created contrary to the authority of the Commission as granted in §671(1).

To allow other governmental entities now to acquire private roads for public use in and through the Waterway would subvert the Act in at least three respects. First, it would allow the destruction of an existing private use which was specifically protected under the Waterway Act. Second, it would allow creation of a public road in the Waterway and increase the prospect of vehicular traffic. Third, it would enable others to do that which the Commission itself was prohibited from doing by the Act, i.e., acquire private roads for public use. Since the Commission was only permitted to relocate existing roads after paying the cost of such relocation, it seems inconsistent to allow other governmental agencies to acquire such roads, particularly without providing for reasonable compensation. The Waterway Act contains numerous safeguards to any regulatory or eminent domain powers, including the requirement of compensation for taking of property. The law under which the Aroostook County Commissioners purported to act contains no such provision for compensation or damages. 23 M.R.S.A. §§4001-4003.

Based on the above analyses, it is my conclusion that the Act prohibits the kind of taking within the Waterway that is being attempted in this case by the County Commissioners of Aroostook County.

Having concluded that the Act prohibits the taking as contemplated in this case, it is

necessary to consider whether the taking as attempted here was completed prior to the creation of the Allagash Wilderness Waterway. The County Commissioners had apparently completed all the formal acts required of them under the statutory requirements of 23 M.R.S.A. § 4001 to lay out the Realty Road as a public way approximately four weeks prior to the passage of the Waterway Act. If these formalities completed the taking prior to the enactment of the Act, then the above discussion is of no consequence since the road would have already been public at the time the Act became effective. If, however, the taking of the road is complete only when all court appeals are final, then the Commission could seek to prevent such taking using the above analysis.

Although the law on this issue is unclear, it appears to be the general rule that a taking by eminent domain is complete as of the time of the completion of legal formalities by the condemning body. In this case, since an appeal is in progress, the effect of such taking or laying out of a road is probably only temporarily suspended and not completely nullified. *Appleton v. Piscataquis County Commissioners,* 80 Me. 284, 14A (1888). Upon completion of the appeal, and assuming it to be resolved in favor of the County Commissioners, it is likely that the taking would relate back to January 4, 1966. Of course, an argument could be made that no taking occurs until all appeals are complete. In such case the Waterway Act could be used to oppose any taking subsequent to the effective date of the law. Although there is no Maine case law on this issue, it is my opinion that such argument would likely be in vain.

The possibility always exists that the procedure followed by the County Commissioners in laying out the road was defective. In such case the order in 1966 laying out the road would be void *ab initio.* Any new attempt by the County Commissioners to acquire the Realty Road by going through the same formalities again could be opposed on the basis of the above rationale. Until such determination is made by an appellate court however, there appears little likelihood that the Commission could successfully oppose the acquisition of the road by the county.

I do not believe that the Commission has any sound legal basis on which it could presently oppose the acquisition of the Realty Road by Aroostook County. If any argument is to be made on the basis of any of the above discussion, I suggest that the landowners be encouraged to make it.

2. The available alternative to control the use of the road within the Waterway is to utilize the provisions of §§666(2) and 671(1).

Section 666(2) requires that new construction within ¼ mile of the restricted zone have the prior approval of the Commission. New construction would, in my judgment, include substantial improvement of existing roads, i.e., surfacing with asphalt or other acts beyond mere maintenance.

Section 671(1) clearly states that all access to the Waterway from public roads shall be controlled by the Commission. The Joint Interim Committee recommended that a proposed Waterway Authority have "control of access from any public road crossing or otherwise within the Waterway to the Waterway." The statutory language in § 671(1), though shorter, has the same thrust as the recommendation of the Interim Committee. The broad language of this section would allow the Commission to prohibit the flow of traffic across the Realty Road through the two-mile Waterway if it found that such requirement was necessary for orderly control of access to the Waterway and preservation of its unique character. This section would allow the Commission to regulate traffic on the road through the Waterway in any fashion which it found reasonably necessary to accomplish such ends.

The issue of how far to go in implementing §§ 666(2) and 671(1) are questions of

policy which must be formulated in the first instance by the Commission. Once a decision is made, I recommend communicating it promptly to the Aroostook County Commissioners, particularly if the Commission anticipates restricting traffic flow or limiting physical changes to the road. A firm stand on the issue of access to and through the Waterway and paving of the road, when combined with the issues on appeal by the landowners, may cause the County Commissioners to abandon the entire plan. If necessary, of course, litigation could be used as a tool to enforce the decision of the Commission regarding access to the Waterway from the Realty Road.

JOHN M. R. PATERSON
Assistant Attorney General

October 19, 1972
Bureau of Alcoholic Beverages

Keith H. Ingraham, Director

Statutory Interpretation of 28 M.R.S.A. § 501

SYLLABUS:

Liquor Manufacturers' License requires payment of both rectifiers' fee and bottlers' fee where neither the rectifying process nor the bottling process is an integral part of the other.

FACTS:

28 M.R.S.A. § 501 authorizes "manufacturers' licenses" to be issued to persons engaged in various liquor processing operations, including the "rectifying" process and the "bottling" process. All manufacturers' licenses authorize the licensees to sell their finished product to the liquor commission, to other licensed Maine manufacturers and to purchasers outside of the State. License fees differ depending upon the particular processes of manufacturer any licensee is engaged in.

Lawrence and Company of Lewiston is engaged in the business of buying alcohol in bulk and rectifying it into whiskey, vodka, gin, and mixed cocktails and also bottling these resulting products in containers that ultimately reach the consumer.

QUESTION:

Is a rectifiers' fee of $500, and additionally a bottlers' fee of $500, required to license a manufacturer who has but one complete operation that engages him in both processes?

ANSWER:

Yes, both fees are chargeable.

REASON:

Generally a business subject to a general occupation tax cannot be divided, and an

additional tax imposed on some of the constituent elements of the business, *unless* the element on which the additional tax is imposed is not a necessary or usual part of the general business. *51 Am Jur 2d, Licenses & Permits, § 21.* In other words if someone has taken out a license for and paid a tax on a certain business he cannot be compelled to take out another license or pay another tax for anything which constitutes an essential part of such business. However, the mere fact that a person is engaged in several distinct occupations is no valid reason for permitting him to carry on one occupation pursuant to a license to carry on another. *51 Am Jur 2d Licenses and Permits, § 44.*

The Maine statute (*28 M.R.S.A. 501*) provides a broad classification of liquor licensing, i.e. "manufacturing", and in effect creates sub-classifications with differing fees for various occupations or processes. One person engaged in more than one occupation or process sub-classification must pay the prescribed fee for each process he is engaged in in order that his entire business operation will be permitted by the manufacturers' license issued him.

Factually, there is nothing to show that bottling in the sense contemplated by the licensing statute is of necessity an integral part of the rectifying business. The rectifier has an option of selling its finished product in bulk, in which case no bottlers' fee would be required, or of selling its finished product in retail containers (i.e. consumer containers) in which case a bottlers' fee in addition to the rectifiers fee is required.

JOHN KENDRICK
Assistant Attorney General

October 20, 1972
Mental Health & Corrections

William F. Kearns, Jr., Commissioner

Meaning of Term "Penal Institution" in Maine Election Statutes.

SYLLABUS:

The term "penal institution" used by the Legislature in the last sentence of the definition of an "absentee voter" in the State's election laws includes inmates of the Women's Correctional Center and Men's Correctional Center.

FACTS:

By inter-departmental memorandum dated October 12, 1972, addressed to the separate Superintendents of the Women's Correctional Center and the Men's Correctional Center, you set forth your views concerning whether inmates of the two reference institutions could legally vote by absentee ballots for candidates seeking State and County offices. In your memorandum, you direct the Superintendents of the two Correctional Centers to advise inmates to exercise their right of franchise, through the use of absentee ballots, for President and Vice-President, and also for State and county offices. Your memorandum urged the Superintendents to act immediately to accomplish the objectives set out in your memorandum and that in the meantime, you would seek an opinion of the Attorney General on the subject.

QUESTION:

Whether the definition of "absentee voter" in the State Election Laws applies to the inmates of the Women's Correctional Center and the Men's Correctional Center regarding the recital that a person who is serving a sentence in jail or penal institution is not an absentee voter?

ANSWER:

Yes.

REASONS:

The last sentence of the definition of "absentee voter" in Title 21 of the Maine Statutes specifies that: "A person who is serving a sentence in a jail or penal institution is not an absentee voter." *21 M.R.S.A. § 1, sub-§ 1* The third paragraph of your memorandum addressed to the separate Superintendents of the Correctional Centers offers the suggestion that the State Correctional Centers are not a "jail" or a "penal institution", as you interpret the meaning of those words. Additionally, you note that the Centers exist not to inflict punishment, but solely to rehabilitate men and women sent to them.

The term "penal institution", as used in the election laws of the State, is not meant, in our opinion, to be given a narrow construction by the Legislature. For example, note the language in *Brown v. State,* (Me. 1971), 274 A.2d 715, wherein the Law Court determined there was no material functional distinctions between the Men's Correctional Center and the Maine State Prison. The Court described the two reference institutions as "penal institutions". In the cited case, the Law Court was asked by a Correctional Center inmate to declare the provisions of the transfer law unconstitutional respecting administrative transfers of incorrigible prisoners from the Men's Correctional Center to the Maine State Prison without notice or hearing because the two institutions were "functionally district". The court declined to do so.

According to decisional law in Kansas, the Kansas State Industrial Reformatory at Hutchinson is a "penal institution". *State ex. rel. Londerholm v. Owens,* 197 Kan. 212, 416 P.2d 259. In the District of Columbia, decisional law determined that for the purposes of divorce statutes, a sentence under the Youth Corrections Act is a sentence to a "penal institution". *Courtney v. Courtney,* D.C. App., 214 A.2d 478. Although cases decided in other jurisdictions are not binding on us, still they can be helpful in their expressed analogies.

If the Legislature intended that the words "penal institution" appearing in the definition of "absentee voter" in the State's elections laws meant only the Maine State Prison, it could have utilized such language as it did in setting forth definitions regarding probation and parole procedures. *34 M.R.S.A. § 1501, sub-§ 6.* Since it did not do so, language appearing in *State v. Millett,* 160 Me. 357, is appropriate.

> "We are ascertaining here not what the Legislature may have meant by what it said but rather are deciding what that which the Legislature said means."

We find no reason to narrowly construe the term "penal institution" used by the Legislature in the last sentence of the definition of an "absentee voter" and accordingly advise you that inmates of the Women's Correctional Center and Men's Correctional Center are in "penal institutions" within the meaning of the term as used in the election laws.

JOHN W. BENOIT, JR.
Deputy Attorney General

Statistics for the Years
1967, 1968, 1969, 1970, 1971, 1972

MAINE CRIMINAL STATISTICS FOR THE YEARS

BEGINNING NOVEMBER 1, 1966

AND

ENDING NOVEMBER 1, 1972

The following pages contain the criminal statistics for the years beginning November 1, 1966 and ending November 1, 1972.

Cases included:

The table deals with completed cases as well as cases pending at the end of the year. Disposition of pending cases is left for inclusion in the figures for the year in which it is finally determined. A case is treated as disposed of when a disposition has been made even though that disposition is subject to later modification. For example, if a defendant is placed on probation, his case is treated as completed, even though probation may be later revoked and sentence imposed or executed. No account is taken of the second disposition.

Defendants in cases on appeal who have defaulted bail are treated as pleading guilty.

Explanation of headings:

(a) Total means total number of cases during the year.

(b) Nol pross., etc., includes all forms of dismissal, such as nol-prossed, dismissed, quashed, continued without sentence, placed on file, etc.

(c) Pending.

(d) Finding of guilty, plea of guilty, or plea of nolo contendere.

(e) Verdict of not guilty.

(f) Under fine are cases where sentence is to fine, costs, restitution or support only provided there is no probation or sentence to imprisonment.

(g) Includes cases of fine and imprisonment.

(h) Incarceration sentence only.

(i) Defendant placed on probation.

1967

1967 ALL COUNTIES – EXCEPT WASHINGTON COUNTY – TOTAL INDICTMENTS AND APPEALS

Crime	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	3183	1158	376	1523 6**	115 5*	855	32	380	256
Arson	14	5	1	8				6	2
Assault and Battery	249	108	17	115	8 1*	40	2	41	32
Assault w/ Intent to Kill	9	3	1	3	2			1	2
Automobile Junkyard	4	3		1		1			
Breaking, Entering & Larceny	398	154	40	197	7	3		105	89
Driving under Influence	336	44	41	214	37	186	13	13	2
Embezzlement	25	15		7	3				7
Escape	25	5	2	17	1			17	
Forgery	112	44	15	49	4	1		26	22
Intoxication	97	44	10	42	1	36	2	3	1
Larceny	138	46	18	71	3	18	1	24	28
Liquor	68	36	7	19 5**	1	18		1	
Manslaughter	3			1	2			1	
Motor Vehicle	992	341	137	494 1**	19	440	5	40	9
Murder	15	3	1	7	4*			7	
Night Hunting	38	7		28	3	27	1		
Non-Support	11	6	2	3				1	2
Rape	20	11	3	2	4			2	
Robbery	40	13	12	13	2			11	2
Sex Crimes	110	32	7	63	8	1		35	27
Miscellaneous	479	238	62	169	10	84	8	46	31

* (5) Not Guilty by reason of mental illness or defect
**(6) License suspended

ARSON

County	Total (a)	Nol-Pros etc. (b)	Pending (c)	Disposition: Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	14	5	1	8				6	2
Cumberland	1		1						
Franklin	2	1		1					1
Hancock	2	1		1				1	
Lincoln	2	2							
Penobscot	1	1							
Sagadahoc	1			1				1	
Somerset	1			1					1
York	4			4				4	

ASSAULT AND BATTERY

Totals	249	108	17	115	8 1*	40	2	41	32
Androscoggin	9	7		2				2	
Aroostook	26	8		17	1	4		3	10
Cumberland	39	18	7	14		6		3	5
Franklin	13	6		6	1	4		1	1
Hancock	12	7		5		2		3	
Kennebec	17	4	2	11		2	1	7	1
Knox	8	3	2	3				2	1
Lincoln	8	1		6	1		1	3	2
Oxford	30	16		11	3	3		6	2
Penobscot	25	8		15	1	6		8	1
Piscataquis	1		1		1*				
Sagadahoc	12	4	2	6		5		1	
Somerset	8	3		5		1			4
Waldo	5	2		3		1			2
York	36	21	3	11	1	6		2	3

*(1) Not guilty by reason of mental defect

ASSAULT WITH INTENT TO KILL

Totals	9	3	1	3	2			1	2
Cumberland	3			1	2				1
Lincoln	1		1						
Oxford	1	1							
Penobscot	2	2							
Somerset	1			1				1	
Waldo	1			1					1

AUTOMOBILE JUNKYARD VIOLATION

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	4	3		1		1			
Androscoggin	1	1							
Kennebec	1	1							
Sagadahoc	1			1		1			
York	1	1							

BREAKING, ENTERING AND LARCENY

Totals	398	154	40	197	7	3		105	89
Androscoggin	14	6		8				8	
Aroostook	37	13		24				15	9
Cumberland	83	28	19	34	2	1		22	11
Franklin	22	10	1	11				8	3
Hancock	9	4		4	1			3	1
Kennebec	69	16	8	45		1		16	28
Knox	6	1	1	4				4	
Lincoln	2			2					2
Oxford	51	32	1	18				7	11
Penobscot	20	3		17				7	10
Piscataquis	5		3		2				
Sagadahoc	2			2				2	
Somerset	36	20	3	13		1		6	6
Waldo	4		2	2					2
York	38	21	2	13	2			7	6

DRIVING UNDER INFLUENCE

Totals	336	44	41	214	37	186	13	13	2
Androscoggin	9	2		6	1	5		1	
Aroostook	38	3	3	29	3	27		1	1
Cumberland	55	10	9	29	7	26	2	1	
Franklin	7	3		4		3	1		
Hancock	20	1	2	15	2	11	1	3	
Kennebec	29	5	6	14	4	9	4	1	
Knox	18	2	6	10		9		1	
Lincoln	11	2		8	1	6	1		1
Oxford	28	3	6	15	4	14		1	
Penobscot	34	3		27	4	25	1	1	
Piscataquis	5		1	3	1	3			
Sagadahoc	7	1	2	3	1	3			
Somerset	21	3	2	9	7	8	1		
Waldo	8	2	1	5		4	1		
York	46	4	3	37	2	33	1	3	

EMBEZZLEMENT

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	25	15		7	3				7
Aroostook	9	6		3					3
Franklin	1	1							
Kennebec	6	1		2	3				2
Oxford	7	6		1					1
Penobscot	2	1		1					1

ESCAPE

Totals	25	5	2	17	1			17	
Aroostook	2	1		1				1	
Cumberland	9			9				9	
Kennebec	3	1	1	1				1	
Knox	2			1	1			1	
Oxford	3	2		1				1	
Piscataquis	1			1				1	
Somerset	1			1				1	
York	4	1	1	2				2	

FORGERY

Totals	112	44	15	49	4	1		26	22
Androscoggin	9	2		7		1		6	
Aroostook	27	17	1	9				4	5
Cumberland	19	6	5	8				4	4
Franklin	8	2		4	2			2	2
Hancock	5	2	2		1				
Kennebec	5	1	1	2	1			1	1
Knox	3	2		1					1
Oxford	8	5		3				2	1
Penobscot	11	3		8				5	3
Sagadahoc	7	1	5	1					1
Somerset	3	2	1						
Waldo	4	1		3				1	2
York	3			3				1	2

INTOXICATION

County	Total (a)	Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
				Disposition					
Totals	97	44	10	42	1	36	2	3	1
Androscoggin	7	6		1		1			
Aroostook	7	4		3		1		2	
Cumberland	23	7	8	8		7	1		
Franklin	2	2							
Hancock	1			1		1			
Kennebec	3	1		2		2			
Knox	6	3		3		2		1	
Lincoln	5	2		2	1	2			
Oxford	13	5		8		8			
Penobscot	14	6		8		6	1		1
Somerset	8	2	2	4		4			
Waldo	2	1		1		1			
York	6	5		1		1			

LARCENY

Totals	138	46	18	71	3	18	1	24	28
Androscoggin	6	3		3		1		2	
Aroostook	14	4		10		3		2	5
Cumberland	28	6	9	13		4		4	5
Franklin	13	4		9		6		1	2
Hancock	5	2		3		1			2
Kennebec	10	5		5		1		2	2
Knox	3	1	1	1				1	
Lincoln	7	1	1	2	3			2	
Oxford	12	6		6		1		2	3
Penobscot	9	3		6				4	2
Piscataquis	2	1		1					1
Sagadahoc	7	3	1	3		1	1		1
Somerset	2	1	1						
Waldo	1			1					1
York	19	6	5	8				4	4

LIQUOR

County	Total (a)	Nol-Pros etc. (b)	Pend-ing (c)	Disposition: Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Pri-son (h)	Pro-ba-tion (i)
Totals	68	36	7	19 5*	1	18		1	
Androscoggin	5	1		3 1*		2		1	
Aroostook	7	3		4		4			
Cumberland	7	3		1 3*		1			
Franklin	1			1		1			
Hancock	2	1		1		1			
Knox	2	1		1		1			
Lincoln	5	3		1	1	1			
Oxford	15	10	4	1		1			
Penobscot	3	2		1		1			
Piscataquis	1			1		1			
Sagadahoc	1	1							
Somerset	2			1		1			
Waldo	1	1		1*					
York	16	10	3	3		3			

*(5) Licenses suspended

MANSLAUGHTER

Totals	3			1	2			1	
Cumberland	1				1				
Kennebec	1			1				1	
York	1				1				

MOTOR VEHICLES

Totals	992	341	137	494 1*	19	440	5	40	9
Androscoggin	58	16		40	2	39		1	
Aroostook	38	13	2	23 1*		20	1	2	
Cumberland	243	88	57	93	4	79		12	2
Franklin	29	7		22		20		2	
Hancock	32	6	2	23	1	20	1	2	
Kennebec	45	13	11	21		18		2	1
Knox	25	10	4	10	1	10			
Lincoln	24	9		13	2	9		2	2
Oxford	109	41	29	37	2	35		1	1
Penobscot	75	21		54		45		8	1
Piscataquis	11	1	2	7	1	7			
Sagadahoc	49	29		18	2	17			1
Somerset	47	3	2	41	1	34	3	4	
Waldo	25	6	2	17		15		2	
York	182	78	26	75	3	72		2	1

*(1) License Suspended

MURDER

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	15	3	1	7	4*			7	
Franklin	1	1							
Kennebec	1			1				1	
Knox	1			1				1	
Penobscot	6	2		3	1*			3	
Somerset	3				3*				
York	3		1	2				2	

*(4) Not Guilty by Reason of Mental Disease or Defect

NIGHT HUNTING

Totals	38	7		28	3	27	1		
Franklin	2			2		2			
Hancock	5	1		3	1	3			
Oxford	9	6		3		3			
Penobscot	14			14		13	1		
Piscataquis	4			4		4			
Somerset	1			1		1			
Waldo	1			1		1			
York	2				2				

NON SUPPORT

Totals	11	6	2	3				1	2
Aroostook	3	1		2				1	1
Cumberland	6	4	2						
Kennebec	1	1							
Penobscot	1			1					1

RAPE

Totals	20	11	3	2	4			2	
Aroostook	2	2							
Cumberland	6	1	2	2	1			2	
Kennebec	1		1						
Oxford	3	3							
Penobscot	4	3			1				
Somerset	2	2							
York	2				2				

ROBBERY

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	40	13	12	13	2			11	2
Aroostook	1	1							
Cumberland	30	10	11	7	2			6	1
Kennebec	2		1	1				1	
Oxford	4	2		2				1	1
Penobscot	2			2				2	
York	1			1				1	

SEX CRIMES

Totals	110	32	7	63	8	1		35	27
Androscoggin	3	2		1				1	
Aroostook	16	9		6	1				6
Cumberland	7	1	2	4				3	1
Franklin	1			1					1
Hancock	1			1				1	
Kennebec	24	8	3	12	1	1		9	2
Knox	4		2	2				1	1
Oxford	11	6		5					5
Penobscot	24	3		18	3			10	8
Sagadahoc	2			2					2
Somerset	8	2		6				5	1
Waldo	1			1				1	
York	8	1		4	3			4	

MISCELLANEOUS

Totals	479	238	62	169	10	84	8	46	31
Androscoggin	23	12		9	2	5		4	
Aroostook	52	28	2	21	1	7		9	5
Cumberland	105	52	25	28		12	2	8	6
Franklin	22	8	2	12		9		2	1
Hancock	17	11	2	4		3		1	
Kennebec	53	18	12	22	1	8	6	8	
Knox	15	9	3	3		1		2	
Lincoln	15	7	1	7		5		2	
Oxford	42	27	4	10	1	7			3
Penobscot	47	24		20	3	8		2	10
Piscataquis	1	1							
Sagadahoc	9	4		4	1	4			
Somerset	18	7		11		5		2	4
Waldo	6		1	5		2		2	1
York	54	30	10	13	1	8		4	1

1967 LAW COURT CASES

County	Name of Case	Outcome
Androscoggin	Fitzherbert, Edward L.	Pending.
	Hodgkins, Francis	Pending.
	Rowe, Forrest A.	Pending.
Aroostook	NONE	
Cumberland	Christian, Wendell O.	Appeal denied.
	Eldridge, Woodbury	Dismissed without prejudice. Appeal premature.
	Estabrook, Ashley G.	Appeal denied.
	Langley, Richard	Appeal denied.
Franklin	Castonguay, Gerard C.	Appeal sustained.
	Wilbur, Stillman E., Jr.	Appeal not prosecuted.
Hancock	Sinclair, Asa H., Jr.	Appeal denied.
Kennebec	Cashman, Wayne and Lizotte, Robert	Judgment for the State.
	Corey, Robert A.	Judgment for the State.
	Lizotte, Robert	Judgment for the State.
	Michaud, Larry J.	Pending.
	Warner, Melvin	Pending.
Knox	NONE	
Lincoln	NONE	
Oxford	NONE	
Penobscot	Binnette, Joseph E.	Judgment for Defendant.
	Coty, Simon P. and Swett, Milton P.	Judgment for State.
	Malloch, Oscar	Judgment for State.
	Reed, William H.	Judgment for State.
Piscataquis	NONE	
Sagadahoc	NONE	
Somerset	NONE	
Waldo	NONE	

York	Beckus, Wayne R.	Denied.
	Brochu, Armand	Pending.
	Ferris, Robert	Pending.
	Gallagher, Robert	Pending.
	Galloway, John	Pending.
	MacDonald, Joseph R.	Denied.
	McLaughlin, Robert	Pending.
	Roberto, Gennero	Pending.
	Spinale, Dominic	Pending.
	Spinale, Frank M.	Pending.

1967
POST-CONVICTION PETITIONS

		STATE COURTS		FEDERAL COURT		
Type of Petition	Total	Superior Court	Appeal to Law Court	U.S.D.C.	U.S.C.A.	U.S. Supreme Ct.
Habeas Corpus (State & Federal)	10	Dismissed (2) Released (1)	Dismissed (1) (Remand)	Dismissed (5) New Trial (1) Released (1)	Pending (1) Remanded for relief (1)	Appeal pending (1)
Motion to Remove Case to Fed. Ct.	1			Dismissed (1)		
Post-Conviction Habeas Corpus (14 M.R.S.A. § 5502, et seq.)	77	Dismissed (54) Withdrawn (7) Pending (3) Remanded (1) Released (12)	Dismissed (12) Remanded (2) Pending (3)			
Mandamus	1	Dismissed (1)				
Petition for Certiorari	1					Cert. Den. (1)
TOTALS	90	81	18	8	2	2

1968

1968 ALL COUNTIES – TOTAL INDICTMENTS AND APPEALS

Crime	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	3635 2†	1242	330	1881 5** 1***	169 7*	1113	24	405	339
Arson	12	5	1	5	1*	1		2	2
Assault & Battery	250	84	18	130	16	47	1	46	36
Assault with Intent to Kill	12	2	3	6	2* 1			6	
Automobile Junkyard	6	2		2	2	1			1
Breaking, Entering and Larceny	386	103	43	232	8	6	7	99	120
Driving Under Influence	442	58	46	299	39	279	9	9	2
Embezzlement	13	8		3	2	1			2
Escape	10	4	1	5				5	
Forgery	132	56	8	60	8	4		33	23
Intoxication	146 2†	57	16	68	5	50		14	4
Larceny	179	79	14	80	5 1*	13		36	31
Liquor	97	60	3	25 5**	4	23		2	
Manslaughter	7	1	2	4				4	
Motor Vehicles	1070	374	62	593	41	529	4	37	23
Murder	11	1	5	3	2			3	
Night Hunting	51	6	1	38	6	35	1	2	
Non Support	11	9		2					2
Rape	21	7	1	6	7			6	
Robbery	31	7	2	21	1*			16	5
Sex Crimes	85	30	5	42	8	2		28	12
Miscellaneous	663	289	99	257 1***	15 2*	122	2	57	76

* (7) Not guilty by reason of mental defect or mental disease
** (5) License Suspended
***(1) Children committed to Health and Welfare
† (2) Defendant Deceased

ARSON

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	12	5	1	5	1*	1		2	2
Cumberland	2	1		1				1	
Franklin	1		1						
Hancock	2	2							
Kennebec	1			1				1	
Penobscot	2	1			1*				
Piscataquis	1			1		1			
Waldo	1	1							2
York	2			2					

*(1) Not guilty by reason of mental defect

ASSAULT AND BATTERY

Totals	250	84	18	130	16 2*	47	1	46	36
Androscoggin	9	6		2	1*	1		1	
Aroostook	37	16	2	19		6		7	6
Cumberland	44	21	2	19	2	6		5	8
Franklin	2		1	1					1
Hancock	13	3		4	5 1*	2		1	1
Kennebec	29	6	10	12	1	2		8	2
Knox	1	1							
Lincoln	10	8		2				2	
Oxford	6			5	1	5			
Penobscot	23	4		17	2	2		9	6
Sagadahoc	14	5		9		3	1	4	1
Somerset	7	2		5		2		2	1
Waldo	9	3		5	1	3		2	
Washington	11	2	3	5	1	2		1	2
York	35	7		25	3	13		4	8

*(2) Not guilty by reason of mental defect or mental disease

AUTOMOBILE JUNKYARD

Totals	6	2		2	2	1			1
Androscoggin	1	1							
Aroostook	1	1							
Cumberland	3			1	2	1			
Hancock	1			1					1

ASSAULT WITH INTENT TO KILL

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	12	2	3	6	1			6	
Cumberland	6		1	5				5	
Hancock	2	1	1						
Kennebec	1	1							
Penobscot	1			1				1	
Washington	1		1						
York	1				1				

BREAKING, ENTERING AND LARCENY

Totals	386	103	43	232	8	6	7	99	120
Androscoggin	10	4		6				6	
Aroostook	20	8	1	10	1		6	4	
Cumberland	107	28	15	64		1		39	24
Franklin	18	10		6	2			1	5
Hancock	7		5	2				1	1
Kennebec	55	8	7	39	1		1	12	26
Knox	8	3		3	2			3	
Lincoln	2	2							
Oxford	14	4	1	9				3	6
Penobscot	40	5	2	33		2		10	21
Piscataquis	5		5						
Sagadahoc	2			1	1				1
Somerset	20	6		13	1			7	6
Waldo	15	6	5	4				1	3
Washington	14	1	2	11		2		4	5
York	49	18		31		1		8	22

DRIVING UNDER INFLUENCE

Totals	442	58	46	299	39	279	9	9	2
Androscoggin	21	5		12	4	12			
Aroostook	54	6	10	36	2	36			
Cumberland	71	9	18	41	3	41			
Franklin	20	4	1	14	1	13		1	
Hancock	14	4		7	3	7			
Kennebec	33	1	4	24	4	20	3	1	
Knox	10	1	2	7		7			
Lincoln	8		1	7		7			
Oxford	33	8	3	20	2	20			
Penobscot	35	2		31	2	25	1	3	2
Piscataquis	7	1	1	5		4		1	
Sagadahoc	14	4		9	1	7	2		
Somerset	21	2	2	12	5	12			
Waldo	19	1	1	15	2	14		1	
Washington	20	2	1	15	2	11	2	2	
York	62	8	2	44	8	43	1		

EMBEZZLEMENT

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	13	8		3	2	1			2
Androscoggin	1				1				
Aroostook	5	4		1		1			
Cumberland	4	2		1	1				1
Penobscot	2	2							
York	1			1					1

ESCAPE

Totals	10	4	1	5				5	
Androscoggin	2	2							
Aroostook	2	1		1				1	
Cumberland	2			2				2	
Hancock	1		1						
Kennebec	1			1				1	
Knox	2	1		1				1	

FORGERY

Totals	132	56	8	60	8	4		33	23
Androscoggin	8	3		5				3	2
Aroostook	19	12	1	6				3	3
Cumberland	25	13	3	9				5	4
Franklin	5	2	3						
Hancock	6	1		4	1			2	2
Kennebec	17	5	1	9	2			4	5
Knox	8	4		4				4	
Oxford	1			1					1
Penobscot	17	7		10				7	3
Sagadahoc	10	4		6		4		1	1
Somerset	11			6	5			4	2
Washington	1	1							
York	4	4							

INTOXICATION

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	146 2*	57	16	68	5	50		14	4
Androscoggin	14	5		9		9			
Aroostook	12	6	1	4	1	2		2	
Cumberland	41	14	11	15	1	9		6	
Franklin	5	1	1	3		2		1	
Knox	3		1	2		2			
Lincoln	7	1		4	2	4			
Oxford	5	4		1		1			
Penobscot	10	3		7		3		3	1
Piscataquis	2	2							
Sagadahoc	10	7		3		2			1
Somerset	9	1	1	7		4		2	1
Waldo	11 2*	2	1	8		8			
Washington	5	3		2		1			1
York	12	8		3	1	3			

*(2) Defendant deceased

LARCENY

Totals	179	79	14	80	5 1*	13		36	31
Androscoggin	8	5		3				3	
Aroostook	22	10	1	11		1		7	3
Cumberland	37	14	8	14	1	1		5	8
Franklin	8	6	1	1					1
Hancock	7	2	2	3		1			2
Kennebec	10			10		1		3	6
Knox	6	3	1	2		1		1	
Lincoln	5	5							
Oxford	3	3							
Penobscot	19	10		9		1		6	2
Sagadahoc	10	3	1	4	2			2	2
Somerset	7	1		6				5	1
Waldo	5	1		4		1		2	1
Washington	1			1		1			
York	31	16		12	2 1*	5		2	5

*(1) Not guilty by reason of mental defect.

LIQUOR

County	Total (a)	Nol-Pros etc. (b)	Pending (c)	Disposition: Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	92	60	3	25	4	23		2	
	5*			5*					
Androscoggin	4	2		2		2			
Cumberland	19	15	2	1		1			
				1*					
Franklin	2	2							
Hancock	5	2		3		3			
Kennebec	4			4		2		2	
Knox	4	1		3		3			
Lincoln	3			3		3			
Oxford	21	18		1	2	1			
Penobscot	6	3		2	1	2			
Piscataquis	1		1						
Sagadahoc	7	4		1		1			
				2*					
Waldo	1			1		1			
York	20	13		4	1	4			
				2*					

*(5) License suspended

MANSLAUGHTER

Totals	7	1	2	4				4	
Aroostook	2			2				2	
Cumberland	2		2						
Kennebec	2	1		1				1	
Penobscot	1			1				1	

MOTOR VEHICLE

Totals	1070	374	62	593	41	529	4	37	23
Androscoggin	49	19		29	1	27		2	
Aroostook	50	11	6	31	2	24		7	
Cumberland	244	81	26	120	17	104	1	8	7
Franklin	49	9	8	31	1	29		1	1
Hancock	22	9	1	12		10			2
Kennebec	57	12	8	35	2	31	1	2	1
Knox	25	5	2	18		17		1	
Lincoln	34	15		18	1	18			
Oxford	104	66	1	34	3	32			2
Penobscot	82	19		62	1	49		5	8
Piscataquis	15	4	1	10		9		1	
Sagadahoc	51	12	4	31	4	31			
Somerset	42	5	4	33		29		3	1
Waldo	18	3		15		14	1		
Washington	21	6	1	14		9	1	4	
York	207	98		100	9	96		3	1

MURDER

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	11	1	5	3	2			3	
Androscoggin	2			1	1			1	
Hancock	1		1						
Kennebec	1	1							
Oxford	1		1						
Piscataquis	2		1	1				1	
Somerset	1			1				1	
Washington	1		1						
York	2		1		1				

NIGHT HUNTING

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	51	6	1	38	6	35	1	2	
Androscoggin	3	1		2		2			
Aroostook	2			2		2			
Cumberland	5			5		5			
Franklin	4			4		4			
Hancock	2				2				
Kennebec	2				2				
Oxford	2			1	1	1			
Penobscot	13			13		13			
Piscataquis	8	4		4		3	1		
Sagadahoc	2	1		1		1			
Somerset	3			3		2		1	
Waldo	1			1		1			
Washington	4		1	2	1	1		1	

NON SUPPORT

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	11	9		2					2
Androscoggin	1	1							
Aroostook	3	2		1					1
Cumberland	5	5							
Kennebec	1			1					1
Waldo	1	1							

RAPE

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	21	7	1	6	7			6	
Aroostook	4	2			2				
Cumberland	1			1				1	
Kennebec	3	1	1		1				
Lincoln	5	2		3				3	
Penobscot	1			1				1	
Somerset	4			1	3			1	
Waldo	1	1							
Washington	1				1				
York	1	1							

ROBBERY

Totals	30 1*	7	2	21	1*			16	5
Aroostook	2	1		1				1	
Cumberland	17	3	2	12				7	5
Kennebec	1			1				1	
Knox	1			1				1	
Penobscot	5	2		3				3	
York	5	1		3	1*			3	

*(1) Not guilty by reason of mental defect

SEX CRIMES

Totals	85	30	5	42	8	2		28	12
Androscoggin	7	3		4		1		3	
Aroostook	20	12		8				6	2
Cumberland	12	3	1	4	4			2	2
Franklin	2	1	1						
Hancock	2			1	1			1	
Kennebec	12	3	1	8				4	4
Oxford	2			1	1	1			
Penobscot	14	4		8	2			6	2
Sagadahoc	3		1	2				1	1
Somerset	1			1				1	
Washington	1		1						
York	9	4		5				4	1

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	660 1* 2**	289	99	257 1*	15 2**	122	2	57	76
Androscoggin	15	8		6 1*		5		1	
Aroostook	51	22	6	23		9		5	9
Cumberland	176	73	38	61	4	18		15	28
Franklin	18	4	7	7		5		2	
Hancock	21	5	2	13	1	8		3	2
Kennebec	60	14	18	25	3	10	1	5	9
Knox	17	12		5		4		1	
Lincoln	26	10		16		13		2	1
Oxford	34	24	2	7	1	3			4
Penobscot	64	34		25	3 2**	9		9	7
Piscataquis	8	2	4	2		2			
Sagadahoc	7	3	1	3		3			
Somerset	21	5	4	12		5		6	1
Waldo	9	2		7		4		1	2
Washington	30	10	10	9	1	5		3	1
York	106	61	7	36	2	19	1	4	12

* (1) Children committed to Health and Welfare
**(2) Not guilty because of insanity.

1968 LAW COURT CASES

County	Name of Case	Outcome
Androscoggin	Fitzherbert, Edward L.	Appeal denied. Judgment for the State.
	Hodgkins, Francis W.	Appeal denied. Judgment for the State.
	Rowe, Forrest Anthony	Appeal denied. Judgment for the State.
Aroostook	McIntire	Appeal denied.
Cumberland	Cadigan, Kenneth A.; Comas, Peter; Garcia, Rasa Lind; Krasnow, Michael Arthur; Rieger, Lawrence P.; Staubauch, Christine	Pending.
	Grant, Lester	Pending.
	Grover, Clarence C.	Appeal dismissed for want of prosecution.
	Martelle, Theresa S.	Pending.
	Perry, Charles F. and Williams, Daniel T.	Pending.
	Russo, Catherine	Pending.
	Terroni, William	Case remanded to Superior Court.
Franklin	Castonguay, Gerard C.	Appeal sustained.
	Hurd, Olin	Appeal not prosecuted.
	Wilbur, Stillman E., Jr.	Appeal not prosecuted.
Hancock	NONE	
Kennebec	Lizotte, Richard	Pending.
	Michaud, Larry J.	Dismissed from law docket and returned for review through regular appellate procedure.
	Warner, Melvin F.	Appeal denied.
Knox	Fernald, George	Appeal denied.
	Miller, Buddie J.	Pending.
Lincoln	NONE	
Oxford	Fitzherbert, Edward R.	Pending.
	Millett, Donald W.	Appeal denied.
	Oliver, Brian	Appeal denied.

Penobscot	NONE	
Piscataquis	NONE	
Sagadahoc	Lamb, Charles	Pending.
	Miller, Bruce	Pending.
Somerset	Fischer, Joseph	Judgment for the State.
	Stevens, Alfred H.	Pending.
Waldo	Harriman, Rodney A.	Case remanded for purpose of providing a supplemental record.
Washington	Emery	Pending.
	Smith	Pending.
York	Brochu, Armand	Partially denied.
	Ferris, Robert	Pending.
	Galloway, John	Appeal denied. Judgment affirmed.
	McLaughlin, Robert	Pending.
	Roberto, Gennero	Pending.
	Smith, William G.	Appeal denied. Judgment affirmed.
	Spinale, Dominic	Pending.
	Spinale, Frank M.	Pending.
	Taplin, David B.	Appeal denied.
	Wheeler, Robert P.	Pending.

1968
POST-CONVICTION PETITIONS

		STATE COURTS		FEDERAL COURT		
Type of Petition	Total	Superior Court	Appeal to Law Court	U.S.D.C.	U.S.C.A.	U.S. Supreme Ct.
Habeas Corpus (Federal)	17			Relief denied 17 Relief granted 1	*Petitioners'* Appeals Denied 1 Case Remanded 1 *State:* Appeal Granted 1 Probable Cause Denied 4 *State:* Appeal Denied 1	cert. denied 4
Post-Conviction Habeas Corpus (State)	60	Relief Denied 47 Relief Granted 10 Petitions Withdrawn 2 Reported to Law Court 1	*Petitioners'* Appeals: Denied 11 Granted 2 *State:* Appeal Granted 2 Dismissed for no prosecution 5			
TOTAL	77					

1969

1969 ALL COUNTIES - EXCEPT LINCOLN - TOTAL INDICTMENTS AND APPEALS

Crime	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	3982 8* 1** 2*** 2****	1227	472	2058 8* 1**	225	1227	20	474	338
Arson	14 1****	2	3	8	1			6	2
Assault & Battery	267	99	31	124	13	39	1	36	48
Assault with Intent to Kill	12	1	6	4	1			4	
Breaking, Entering & Larceny	427	135	34	247	11	5		137	105
Driving Under Influence	470	69	33	323 1*	44	311	5	5	2
Drugs	112	43	30	37	2	10	2	15	10
Embezzlement	19	11	1	7				1	6
Escape	19		3	16				15	1
Forgery	102	33	1	61	7	1		31	29
Intoxication	94	35	6	48	5	34		10	4
Larceny	145	37	14	89	5	24	1	32	32
Liquor	99	45	5	37 7*	5	32	3		2
Manslaughter	10	2		8				6	2
Motor Vehicles	1030	314	96	567	53	518	2	39	8
Murder	11	2	2	5 1**	1			6	
Night Hunting	44	7	2	33	2	29	3	1	
Non Support	8	3	2	2	1				2
Rape	29	3		20	6			18	2
Robbery	29	4	5	17	3			15	2
Sex Crimes	70	20	5	33	12	2		15	16
Miscellaneous	980 2*** 1****	362	193	372	53	222	3	82	65

* (8) License Suspended
** (1) Guilty of Manslaughter
*** (2) Defendant deceased
****(2) Committed to Commissioner of Mental Health & Corrections

ARSON

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	14 1*	2	3	8	1			6	2
Aroostook	4		2	1	1				1
Franklin	1		1						
Kennebec	1*								
Penobscot	5	2		3				2	1
Sagadahoc	1			1				1	
Waldo	1			1				1	
York	2			2				2	

*(1) Committed to Commissioner of Mental Health and Corrections

ASSAULT AND BATTERY

Totals	267	99	31	124	13	39	1	36	48
Androscoggin	12	9		2	1	1		1	
Aroostook	30	16	2	12		1		2	9
Cumberland	51	20		26	5	12		10	4
Franklin	8	1	1	6		3			3
Hancock	14	6	1	6	1	2		3	1
Kennebec	11	6		4	1	2			2
Knox	6	4	2						
Oxford	14	4	3	7		2			5
Penobscot	37	7	2	28		5	1	6	16
Sagadahoc	6	2	1	3		2		1	
Somerset	12	3	1	8		2		4	2
Waldo	6	2		4		1		3	
Washington	7		3	4		1		1	2
York	53	19	15	14	5	5		5	4

ASSAULT WITH INTENT TO KILL

Totals	12	1	6	4	1			4	
Cumberland	3			3				3	
Franklin	1				1				
Knox	1		1						
Penobscot	6	1	4	1				1	
Washington	1		1						

BREAKING, ENTERING AND LARCENY

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	427	135	34	247	11	5		137	105
Androscoggin	23	12		10	1			9	1
Aroostook	59	26	9	24		4		10	10
Cumberland	66	16		47	3			38	9
Franklin	4			4				1	3
Hancock	18	12	2	4				2	2
Kennebec	45	9		33	3			13	20
Knox	22	9	7	6				3	3
Oxford	17	5	1	10	1			3	7
Penobscot	47	6		40	1			21	19
Piscataquis	17	2	5	10				10	
Sagadahoc	4	1		3				2	1
Somerset	23	3	1	19				6	13
Waldo	20	12		8				1	7
Washington	15	3	4	8		1		5	2
York	47	19	5	21	2			13	8

DRIVING UNDER INFLUENCE

Totals	469 1*	69	33	323 1*	44	311	5	5	2
Androscoggin	9	1		7	1	7			
Aroostook	51	2	9	35	5	35			
Cumberland	99	20		69	10	67	2		
Franklin	15	1	1	13		13			
Hancock	16	1		15		15			
Kennebec	27	2		22	3	21	1		
Knox	13		1	12		11			1
Oxford	30	9	3	13 1*	4	13			
Penobscot	55	7	2	45	1	44	1		
Piscataquis	9		3	5	1	4		1	
Sagadahoc	25	3	1	17	4	17			
Somerset	18	2	1	13	2	13			
Waldo	13	1		10	2	9		1	
Washington	12	2	2	7	1	5		2	
York	78	18	10	40	10	37	1	1	1

*(1) License Suspended

DRUGS

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	112	43	30	37	2	10	2	15	10
Androscoggin	1	1							
Aroostook	17	6	5	6		2		3	1
Cumberland	9	5		4			1	1	2
Hancock	22	2	16	3	1			3	
Kennebec	11	5		6				3	3
Oxford	1				1				
Penobscot	5	1	2	2			1	1	
Piscataquis	7	7							
Sagadahoc	1			1		1			
Somerset	9	1	1	7		6			1
Washington	4	1		3		1		2	
York	25	14	6	5				2	3

EMBEZZLEMENT

Totals	19	11	1	7				1	6
Androscoggin	1	1							
Aroostook	4	2		2					2
Franklin	5	5							
Kennebec	1			1					1
Penobscot	7	2	1	4				1	3
York	1	1							

ESCAPE

Totals	19		3	16				15	1
Androscoggin	7			7				7	
Aroostook	1			1					1
Cumberland	4			4				4	
Franklin	1			1				1	
Hancock	2		1	1				1	
Kennebec	1		1						
Knox	1		1						
Waldo	2			2				2	

FORGERY

County	Total (a)	Disposition							
		Nol-Pros etc. (b)	Pend-ing (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Pri-son (h)	Pro-ba-tion (i)
Totals	102	33	1	61	7	1		31	29
Androscoggin	9	3		6				6	
Aroostook	16	11		5				3	2
Cumberland	15	3		12		1		5	6
Franklin	5	2		3				3	
Kennebec	6		1	3	2				3
Knox	10	5		5				4	1
Oxford	8	3		2	3				2
Penobscot	19	2		17				8	9
Piscataquis	1			1				1	
Somerset	5	3		1	1			1	
York	8	1		6	1				6

INTOXICATION

Totals	94	35	6	48	5	34		10	4
Androscoggin	7	1		6		5		1	
Aroostook	4			4		3		1	
Cumberland	31	13		15	3	9		5	1
Franklin	3			3		2		1	
Kennebec	3	2		1		1			
Knox	3	1		2		2			
Oxford	8	4	3		1				
Penobscot	7	3	1	3				2	1
Sagadahoc	9	3		5	1	3			2
Somerset	6	2		4		4			
Waldo	2	1		1		1			
Washington	2	1		1		1			
York	9	4	2	3		3			

LARCENY

Totals	145	37	14	89	5	24	1	32	32
Androscoggin	3	2			1				
Aroostook	17	3		14		4	1	4	5
Cumberland	19	9		9	1	4		4	1
Franklin	3	1		2				2	
Hancock	8	1	2	5		1			4
Kennebec	3			2	1			1	1
Knox	1			1					1
Oxford	19	8	5	4	2	1		1	2
Penobscot	22	1	1	20		8		2	10
Piscataquis	4		2	2		1		1	
Sagadahoc	9	2	1	6				4	2
Somerset	12	2		10		1		8	1
Waldo	7	4		3				3	
Washington	3			3					3
York	15	4	3	8		4		2	2

LIQUOR

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	92 7*	45	5	37 7*	5	32	3		2
Androscoggin	9	6		2 1*		1	1		
Aroostook	5	3		2		2			
Cumberland	23	11		9 3*		8			1
Franklin	3	1		2		1	1		
Hancock	3	1		2		2			
Kennebec	1	1							
Knox	4	2		2		2			
Oxford	18	7		4 2*	5	4			
Penobscot	7	2		4 1*		3	1		
Piscataquis	1			1		1			
Sagadahoc	8	4		4		4			
Waldo	4	2		2		2			
Washington	4	2		2		1			1
York	9	3	5	1		1			

*(7) License Suspended

MANSLAUGHTER

Totals	10	2		8				6	2
Androscoggin	1			1				1	
Aroostook	2			2				1	1
Cumberland	2	1		1					1
Kennebec	2			2				2	
York	3	1		2				2	

MOTOR VEHICLES

Totals	1030	314	96	567	53	518	2	39	8
Androscoggin	69	27		42		39		3	
Aroostook	41	8	4	27	2	26		1	
Cumberland	235	80		140	15	123	1	13	3
Franklin	32	13	3	15	1	15			
Hancock	21	6		15		15			
Kennebec	22	11		10	1	9		1	
Knox	21	5		13	3	13			
Oxford	91	36	13	32	10	29		2	1
Penobscot	124	28	3	90	3	78	1	7	4
Piscataquis	13	1	1	10	1	7		3	
Sagadahoc	84	23	10	45	6	44		1	
Somerset	32	7	5	19	1	17		2	
Waldo	47	11		35	1	30		5	
Washington	25	8	1	13		12		1	
York	173	50	56	61		61			

MURDER

County	Total (a)	Nol-Pros etc. (b)	Pending (c)	Disposition: Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	10 1*	2	2	5 1*	1			6	
Aroostook	1				1				
Cumberland	4	2		2				2	
Hancock	1			1				1	
Oxford	1			1				1	
Penobscot	1			1*				1	
Piscataquis	1		1						
Washington	2		1	1				1	

*(1) Guilty of Manslaughter

NIGHT HUNTING

Totals	44	7	2	33	2	29	3	1	
Androscoggin	1			1		1			
Aroostook	4	1		3		3			
Hancock	2			2		2			
Knox	2			2		2			
Oxford	3			2	1	2			
Penobscot	12	4		8		7	1		
Piscataquis	3		2	1				1	
Sagadahoc	4			4		4			
Somerset	4	1		3		1	2		
Waldo	2			2		2			
Washington	4			3	1	3			
York	3	1		2		2			

NON SUPPORT

Totals	8	3	2	2	1				2
Aroostook	2		1	1					1
Cumberland	3	1		1	1				1
Waldo	1	1							
York	2	1	1						

RAPE

Totals	29	3		20	6			18	2
Androscoggin	4	2		2				2	
Aroostook	1	1							
Cumberland	2			2				2	
Kennebec	3			1	2			1	
Oxford	1				1				
Penobscot	5			4	1			4	
Somerset	4			2	2			2	
Washington	3			3				1	2
York	6			6				6	

ROBBERY

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	29	4	5	17	3			15	2
Androscoggin	3	2		1				1	
Cumberland	14	1		11	2			11	
Kennebec	3		1	2				1	1
Oxford	3		2		1				
Penobscot	3		2	1					1
Sagadahoc	1	1							
York	2			2				2	

SEX CRIMES

Totals	70	20	5	33	12	2		15	16
Androscoggin	3			3		1		2	
Aroostook	13	7		6		1		3	2
Cumberland	4	2		2				1	1
Kennebec	6	1			5				
Knox	6	3	2		1				
Oxford	4	2	1	1					1
Penobscot	11	2		8	1			4	4
Piscataquis	1			1				1	
Sagadahoc	4		2		2				
Somerset	6			5	1			3	2
Washington	7			6	1			1	5
York	5	3		1	1				1

MISCELLANEOUS

Totals	539 2* 1**	223	90	198	28	109	2	47	40
Androscoggin	21	17		4		1		2	1
Aroostook	57 2*	17	4	36		19	2	5	10
Cumberland	116	60		44	12	24		16	4
Franklin	28	15	6	6	1	6			
Hancock	21	7	4	10		8		2	
Kennebec	21 1**	14		5	2	2		1	2
Knox	15	4	2	9		2		5	2
Oxford	38	20	13	2	3	2			
Penobscot	63	16	5	38	4	18		7	13
Piscataquis	20	3	8	8	1	4		4	
Sagadahoc	15	4	2	8	1	6			2
Somerset	16	8	2	6		4		2	
Waldo	7	3		3	1	2			1
Washington	35	7	24	2	2				2
York	66	28	20	17	1	11		3	3

* (2) Defendant deceased

**(1) Committed to Commissioner of Mental Health and Corrections

1969 LAW COURT CASES

County	Name of Case	Outcome
Androscoggin	Not reported	
Aroostook	Not reported	
Cumberland	Grover G. Alexander	Appeal denied.
	Lucien M. Aubut	Appeal denied.
	Peter D. Petersen	Appeal denied.
	John C. Rastrom	Appeal denied.
Franklin	Stillman E. Wilbur, Jr.	Pending.
	Robert D. Stoddard	Pending.
Hancock	No cases	
Kennebec	Roger P. Blaisdell	Remanded to Superior Court.
	Arthur J. Jenness	Remanded to Superior Court.
	Raymond J. Butler	Appeal denied.
	Richard Lizotte	Appeal denied.
	Richard Lizotte	Appeal denied.
Knox	Not reported	
Lincoln	Not reported	
Oxford	No cases	
Penobscot	Ruth Bull	Dismissed.
	Paul A. Lindsey	Appeal denied.
Piscataquis	No cases	
Sagadahoc	Not reported	
Somerset	Fred O'Clair	New trial ordered.
	Robert O. Mower	Appeal denied.
Waldo	Archie Barrett	Appeal denied.
Washington	Not reported	
York	Robert Wheeler	Appeal sustained.
	Robert Ferris	Appeal sustained.

1969

POST-CONVICTION PETITIONS

		STATE COURTS		FEDERAL COURT		
Type of Petition	Total	Superior Court	Appeal to Law Court	U.S.D.C.	U.S.C.A.	U.S. Supreme Ct.
Habeas Corpus (Federal)	10			Relief Denied 10	*Petitioners'* Appeal Denied 1 *Petitioners'* Appeal Granted 1 Probable Cause Denied 2	
Post-Conviction Habeas Corpus (State)	106	Relief denied 70 Relief Granted 29 Withdrawn 5 Reported to Law Court 2	*Petitioners'* Appeal Denied 22 *Petitioners'* Appeal Granted 3 *Petitioners'* Appeal Withdrawn 4 Dismissed for no prosecution 5 *State's* Appeal Denied 1 *State's* Appeal Granted 1			
Total	116					

1970

1970 ALL COUNTIES – EXCEPT LINCOLN – TOTAL INDICTMENTS AND APPEALS

Crime	Total (a)	Disposition: Nol-Pros Etc. (b)	Pend-ing (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Pri-son (h)	Pro-ba-tion (i)
Totals	4065 4* 1**	1403	431	2063 4*	168 1**	1266	43	425	329
Arson	20	5	4	8	3			7	1
Assault & Battery	306	111	33	151	11	52	4	62	33
Assault With Intent to Kill	8	3	1	3	1			3	
Breaking, Entering & Larceny	456	176	37	227	16	7		40	180
Driving While Impaired	526	90	44	366	26	352	3	11	
Drugs	183	80	33	67	3	12	18	12	25
Embezzlement	28	21	1	5	1	1		2	2
Escape	28	4	7	16	1			15	1
Forgery	103	31	6	64	2	2		47	15
Intoxication	112	36	9	64	3	47		15	2
Larceny	143	46	18	76	3	16		41	19
Liquor	70	30	8	27 3*	2	21	2	3	1
Manslaughter	4		1	2	1			2	
Motor Vehicles	1171	394	112	628 1*	36	557	9	53	9
Murder	7		3	1	2 1**			1	
Night Hunting	48	7	3	33	5	32	1		
Non Support	1	1							
Rape	32	8	5	10	9			9	1
Robbery	31	12	5	13	1			12	1
Sex Crimes	106	44	11	42	9	15		23	4
Miscellaneous	687	304	90	260	33	152	6	67	35

* (4) License suspended
**(1) Not Guilty by reas on of Mental Disease

ARSON

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	20	5	4	8	3			7	1
Androscoggin	1	1							
Aroostook	5	2		3				3	
Franklin	1		1						
Hancock	1		1						
Penobscot	2			2				2	
Somerset	1				1				
Washington	5	2		3				2	1
York	4		2		2				

ASSAULT AND BATTERY

Totals	306	111	33	151	11	52	4	62	33
Androscoggin	10	7		2	1			2	
Aroostook	26	10		16		4	1	10	1
Cumberland	55	23		32		9		20	3
Franklin	6	1	2	2	1	2			
Hancock	14	7	4	3		1		2	
Kennebec	27	6	9	10	2	4		1	5
Knox	7	4		2	1			2	
Oxford	17	5	2	9	1	4			5
Penobscot	47	7		38	2	10	1	15	12
Piscataquis	1	1							
Sagadahoc	16	5	1	9	1	5		4	
Somerset	5	2	1	2					2
Waldo	5	3		1	1	1			
Washington	18	7	2	9		3	1	4	1
York	52	23	12	16	1	9	1	2	4

ASSAULT WITH INTENT TO KILL

Totals	8	3	1	3	1			3	
Androscoggin	1	1							
Cumberland	1	1							
Kennebec	1		1						
Knox	1			1				1	
Penobscot	3	1		1	1			1	
Washington	1			1				1	

BREAKING, ENTERING AND LARCENY

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	456	176	37	227	16	7		40	180
Androscoggin	24	10		13	1			13	
Aroostook	43	19		23	1	5		16	2
Cumberland	45	12	1	29	3			28	1
Franklin	20	13	1	6				2	4
Hancock	19	7	3	8	1	2		6	
Kennebec	68	16	17	32	3			29	3
Knox	22	6		15	1			11	4
Oxford	15	4		10	1			3	7
Penobscot	44	15		29				10	19
Piscataquis	4	1		3				3	
Sagadahoc	8	3		3	2			3	
Somerset	31	12	2	15	2			3	12
Waldo	6	3		2	1			2	
Washington	60	43	1	16				9	7
York	47	12	12	23				7	16

DRIVING WHILE IMPAIRED

Totals	526	90	44	366	26	352	3	11	
Androscoggin	14	4		10		10			
Aroostook	65	2	5	58		56		2	
Cumberland	87	21		57	9	54	1	2	
Franklin	26	3	1	22		22			
Hancock	21	4	3	12	2	12			
Kennebec	43	4	12	25	2	22		3	
Knox	18	2		16		16			
Oxford	31	8	1	21	1	21			
Penobscot	58	3		54	1	51	1	2	
Piscataquis	8	2		6		6			
Sagadahoc	23	5		16	2	16			
Somerset	15	3		11	1	10		1	
Waldo	22	2		20		20			
Washington	18	5	3	10		9	1		
York	77	22	19	28	8	27		1	

DRUGS

Totals	183	80	33	67	3	12	18	12	25
Androscoggin	16	13		3				3	
Aroostook	22	3	1	18		4	11	2	1
Cumberland	5	2		3		2		1	
Franklin	3			3			1		2
Hancock	34	19		15				2	13
Kennebec	9	2	3	4		1	2	1	
Oxford	1	1							
Penobscot	11	2		9		1	2	1	5
Piscataquis	4	3		1		1			
Sagadahoc	1	1							
Somerset	2		1	1			1		
Waldo	2	1		1		1			
Washington	2			2				2	
York	71	33	28	7	3	2	1		4

EMBEZZLEMENT

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	28	21	1	5	1	1		2	2
Androscoggin	3	2			1				
Aroostook	3			3		1		2	
Hancock	1	1							
Penobscot	20	18		2					2
Washington	1		1						

ESCAPE

Totals	28	4	7	16	1			15	1
Androscoggin	2	1		1				1	
Cumberland	8			8				8	
Kennebec	7		5	2				2	
Knox	3	1		1	1			1	
Oxford	2			2				1	1
Penobscot	2	1		1				1	
Waldo	1			1				1	
Washington	1	1							
York	2		2						

FORGERY

Totals	103	31	6	64	2	2		47	15
Androscoggin	11	8		3		1		2	
Aroostook	13	3		9	1			8	1
Cumberland	11	5		6				6	
Franklin	8	1		7				7	
Hancock	6	3	1	2				2	
Kennebec	21	5	4	12				12	
Knox	11			10	1			5	5
Penobscot	13	4		9		1		2	6
Somerset	2			2				1	1
Waldo	3	1		2				1	1
Washington	1			1				1	
York	3	1	1	1					1

INTOXICATION

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	112	36	9	64	3	47		15	2
Androscoggin	12	3		9		4		5	
Aroostook	11	2		9		6		3	
Cumberland	28	18		10		9		1	
Franklin	3			2	1	2			
Hancock	2	1		1		1			
Kennebec	3		2	1		1			
Knox	3			3		3			
Oxford	6	3		3		2			1
Penobscot	20	5	1	14		10		3	1
Piscataquis	1				1				
Sagadahoc	2	1		1		1			
Somerset	4	1		3		3			
Waldo	3			3		3			
Washington	4		1	3				3	
York	10	2	5	2	1	2			

LARCENY

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	143	46	18	76	3	16		41	19
Androscoggin	2	1		1		1			
Aroostook	13	7		6		1		5	
Cumberland	31	14	1	16		2		13	1
Franklin	5	1	3	1					1
Hancock	3	2	1						
Kennebec	20	5	2	13		1		12	
Oxford	10	2	2	6		3		1	2
Penobscot	16	4		11	1	1		4	6
Piscataquis	1			1				1	
Sagadahoc	8	4		3	1	1		2	
Somerset	5			5		1			4
Waldo	1			1				1	
Washington	5	2	1	2				1	1
York	23	4	8	10	1	5		1	4

LIQUOR

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	67 3*	30	8	27 3*	2	21	2	3	1
Aroostook	8	3		5		3	2		
Cumberland	4	1		3		3			
Franklin	2	2							
Hancock	5			5		4		1	
Kennebec	7	1	2	4		2		2	
Oxford	10	6	2	2		1			1
Penobscot	5	1		3 1*		3			
Sagadahoc	3	2		1*					
Waldo	1			1		1			
York	25	14	4	4 1*	2	4			

*(3) License Suspended

MANSLAUGHTER

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	4		1	2	1			2	
Penobscot	2			1	1			1	
Piscataquis	1			1				1	
Washington	1		1						

MOTOR VEHICLES

Totals	1170 1*	394	112	628 1*	36	557	9	53	9
Androscoggin	67	19		48		42		6	
Aroostook	79	15		63	1	55	1	6	1
Cumberland	166	81		78	7	68	3	7	
Franklin	48	11	3	33	1	30		2	1
Hancock	36	9	3	23 1*		17		6	
Kennebec	44	12	16	15	1	11	1	3	
Knox	28	5	3	20		18		2	
Oxford	123	46	10	65	2	57		3	5
Penobscot	106	21		83	2	67		15	1
Piscataquis	3			3		3			
Sagadahoc	91	30	3	56	2	52	1	3	
Somerset	26	3	6	17		15	1		1
Waldo	20	3		17		17			
Washington	28	8	5	13	2	11	2		
York	306	131	63	94	18	94			

*(1) License suspended

MURDER

Totals	6 1*		3	1	2 1*			1	
Cumberland	1				1*				
Kennebec	2		2						
Washington	2			1	1			1	
York	2		1		1				

*(1) Insanity-State Hospital

NIGHT HUNTING

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	48	7	3	33	5	32	1		
Androscoggin	4	1	2	1		1			
Aroostook	7	2		3	2	3			
Cumberland	4	2		2		2			
Hancock	5	1		4		4			
Knox	3			3		3			
Penobscot	4			4		3	1		
Piscataquis	10			10		10			
Somerset	2	1		1		1			
Washington	8		1	5	2	5			
York	1				1				

NON SUPPORT

Totals	1	1							
York	1	1							

RAPE

Totals	32	8	5	10	9			9	1
Aroostook	2	1			1				
Cumberland	2			1	1			1	
Hancock	1	1							
Kennebec	6		5	1				1	
Knox	2	2							
Penobscot	7	4		2	1			1	1
Piscataquis	1			1				1	
Somerset	4				4				
York	7			5	2			5	

ROBBERY

Totals	31	12	5	13	1			12	1
Androscoggin	5	4		1				1	
Cumberland	4		1	3				3	
Franklin	3		3						
Kennebec	1			1				1	
Oxford	2	2							
Penobscot	10	4		5	1			4	1
Somerset	1	1							
Waldo	2			2				2	
York	3	1	1	1				1	

SEX CRIMES

County	Total (a)	Nol-Pros etc. (b)	Pend-ing (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Pro-ba-tion (i)
				Disposition					
Totals	106	44	11	42	9	15		23	4
Aroostook	37	17		19	1	11		8	
Cumberland	8	1		4	3	1		3	
Franklin	3		2	1				1	
Hancock	7	3		3	1			2	1
Kennebec	15	3	8	1	3			1	
Knox	2	1		1		1			
Oxford	1			1				1	
Penobscot	20	14		6		1		3	2
Piscataquis	3	1		2				2	
Sagadahoc	1	1							
Somerset	1			1					1
Waldo	1	1							
Washington	2		1	1				1	
York	5	2		2	1	1		1	

MISCELLANEOUS

Totals	687	304	90	260	33	152	6	67	35
Androscoggin	41	19		22		13		9	
Aroostook	42	20	2	20		18		2	
Cumberland	112	51	3	54	4	33		20	1
Franklin	21	13	5	3		1		1	1
Hancock	34	17	6	9	2	7		2	
Kennebec	59	18	17	16	8	4	3	8	1
Knox	22	8		13	1	5		2	6
Oxford	44	24	3	17		9			8
Penobscot	79	35	1	39	4	14	1	12	12
Piscataquis	7	6			1				
Sagadahoc	28	13	2	12	1	9	1	1	1
Somerset	21	9	1	11		7		4	
Waldo	12	2		10		6		4	
Washington	54	19	17	15	-3	11	1	2	1
York	111	50	33	19	9	15			4

1970 LAW COURT CASES

County	Name of Case	Outcome
Androscoggin	Not Reported	
Aroostook	Not Reported	
Cumberland	Joseph A. Wyman	Appeal sustained.
	Frank Fournier	Appeal denied.
	Clifford G. Small	Appeal denied.
	Richard Ward	Appeal denied.
	Thomas W. Simpson	Appeal denied.
	Bruce R. Millett	Appeal denied.
	Bruce C. Weeks	Appeal denied.
	Frank J. Toppi, Philip B. Shaw, Dennis J. Cellamare	Appeals denied.
	Royal River Packing Co.	Remanded to District Court.
	Kendall T. White, Jr.	Motion granted, case dismissed.
	Stephen R. Aucoin	Motion granted, case dismissed.
	John W. Newton, Jr. and Regina Gores	Case dismissed before oral argument.
Franklin	Stillman E. Wilbur, Jr.	Pending.
	Gerard C. Castonguay	Appeal denied.
	Robert D. Stoddard	Pending.
Hancock	No cases	
Kennebec	Robert Ifill	Appeal denied.
Knox	Eugene A. Benner	Pending.
Lincoln	Not Reported	
Oxford	No cases	
Penobscot	William R. Logan	Appeal denied.
Piscataquis	Robert Mottram	Pending.
	Augustus Heald	Pending.
Sagadahoc	Not Reported	
Somerset	Daniel Moody	Pending.
Waldo	No cases	
Washington	Not reported	

York	Fred Benoski	Pending.
	Ronald Clark	Pending
	Robert A. Cullen	Pending.
	Robert H. King	Pending.
	Romeo Santosuosso	Pending.
	Douglas Dalphonse	Pending.
	Charles Evans	Pending.
	Caroline Perkins	Pending.

1970
POST-CONVICTION PETITIONS

		STATE COURTS				FEDERAL COURT					
Type of Petition	Total	Superior Court		Appeal to Law Court		U.S.D.C.		U.S.C.A.		U.S. Supreme Ct.	
Habeas Corpus (Federal)	19					*Petitioners'* Relief		*Petitioners'* Appeal		Cert. Granted	
						Denied	18	Granted	1	State	1
						Granted	1			(C.C.A. reversed)	
								Cert. of Probable Cause			
								Denied	1	Cert. denied	
										State	1
								State's Appeal			
								Denied	1		
Post-Conviction Habeas Corpus (State)	120	Relief denied	72	*Petitioners'*							
		Relief granted	34	Appeal denied	11						
		Withdrawn	11	Granted	1						
		Reported to		*State's*							
		Law Court	1	Appeal granted	2						
				Pending	4						
		Pending	2	Dismissed for no prosecution	10						
Total	139										

1971

1971 ALL COUNTIES – EXCEPT LINCOLN – TOTAL INDICTMENTS AND APPEALS

Crime	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Total	4568 1* 7** 1***	1539	409	2459 1* 7**	161	1551	55	635	218
Arson	16	8	1	5	2			3	2
Assault and Battery	267 1*	108	21	133 1*	5	51	3	62	17
Assault with Intent to Kill	22	9	2	10	1			8	2
Breaking, Entering and Larceny	493	179	34	271	9	20	1	156	94
Driving While Impaired	646	105	62	458	21	434	10	14	
Drugs	319	102	24	168	25	55	15	88	10
Embezzlement	19	8	1	6	4			6	
Escape	30	10	3	17				16	1
Forgery	102	41	24	35	2	2		22	11
Intoxication	87	30	8	47	2	38		7	2
Larceny	182	53	23	102	4	26	2	50	24
Liquor	66 4**	29	5	30 4**	2	24	2	1	3
Manslaughter	1			1				1	
Motor Vehicles	1259 3**	418	115	698 3**	28	633	11	48	6
Murder	7 1***	1	3	3				3	
Night Hunting	84	24	1	51	8	46	1	2	2
Non-Support	1	1							
Rape	18	7	2	5	4			4	1
Robbery	48	9	2	32	5	1	1	29	1
Sex Crimes	50	10	3	33	4	9		21	3
Miscellaneous	851 1*	387	75	354	35	212	9	94	39

* (2) Defendant Deceased
** (7) License Suspended
***(1) Not Guilty by Reason of Mental Disease or Defect

ARSON

County	Total (a)	Disposition: Nol-Pros Etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	16	8	1	5	2			3	2
Aroostook	2	1		1				1	
Cumberland	3	1		2				2	
Hancock	1			1					1
Kennebec	1			1					1
Somerset	2	2							
York	7	4	1		2				

ASSAULT AND BATTERY

Totals	267 1*	108	21	133 1*	5	51	3	62	17
Androscoggin	9	4	1	3	1	2			1
Aroostook	34	12		22		6	2	14	
Cumberland	51	28		21	2	8		13	
Franklin	5	2		3		1		1	1
Hancock	11	7		4				1	3
Kennebec	17	5		12		4		7	1
Knox	1			1				1	
Oxford	12	2	2	8		1		3	4
Penobscot	44 1*	13	1	29 1*	1	13	1	15	
Piscataquis	1	1							
Sagadahoc	12	7	2	3		2		1	
Somerset	11	1		9	1	4		2	3
Waldo	5	2		3		1		2	
Washington	8	3		5		4			1
York	46	21	15	10		5		2	3

*(1) Defendant deceased

ASSAULT WITH INTENT TO KILL

Totals	22	9	2	10	1			8	2
Androscoggin	2		2						
Cumberland	6	4		2				2	
Hancock	1			1				1	
Kennebec	3			2	1			2	
Penobscot	2	1		1				1	
Washington	7	4		3				1	2
York	1			1				1	

BREAKING, ENTERING AND LARCENY

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	493	179	34	271	9	20	1	156	94
Androscoggin	35	16	2	17		1		5	11
Aroostook	43	6		34	3	2		32	
Cumberland	58	12		46		2		41	3
Franklin	20	7		13				7	6
Hancock	33	23		9	1			1	8
Kennebec	51	25		25	1			14	11
Knox	2			2				1	1
Oxford	11	1	6	4				1	3
Penobscot	41	16	1	23	1	2	1	17	3
Piscataquis	16	6	3	7				5	2
Sagadahoc	25	11		14				12	2
Somerset	41	20	5	15	1			7	8
Waldo	13			12	1	11		1	
Washington	36	15	2	18	1			4	14
York	68	21	15	32		2		8	22

DRIVING WHILE IMPAIRED

Totals	646	105	62	458	21	434	10	14	
Androscoggin	27	5	1	19	2	19			
Aroostook	85	9		74	2	70	1	3	
Cumberland	139	20		114	5	109	2	3	
Franklin	20	4		15	1	13	1	1	
Hancock	17	4		12	1	12			
Kennebec	22	3		18	1	15		3	
Knox	2			2		1	1		
Oxford	36	9	8	19		18		1	
Penobscot	60	5		54	1	51	3		
Piscataquis	2		1	1				1	
Sagadahoc	49	7	1	41		39	1	1	
Somerset	32	4		25	3	25			
Waldo	13			12	1	11	1		
Washington	19	2	4	12	1	12			
York	123	33	47	40	3	39		1	

DRUGS

Totals	319	102	24	168	25	55	15	88	10
Androscoggin	20	6	2	10	2	3		6	1
Aroostook	41	8		33		7	10	13	3
Cumberland	24	6		17	1	5		12	
Franklin	11	4		7		2		5	
Hancock	11	5		2	4		1		1
Kennebec	15	4		11		4	1	6	
Oxford	15	3	3	5	4	4			1
Penobscot	60	18		42		6	2	34	
Piscataquis	4			3	1			3	
Sagadahoc	22	5		8	9	6		2	
Somerset	10	4	2	4		1		1	2
Waldo	1			1				1	
Washington	5	1	2	2		2			
York	80	38	15	23	4	15	1	5	2

EMBEZZLEMENT

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	19	8	1	6	4			6	
Aroostook	4	2		2				2	
Oxford	5			1	4			1	
Penobscot	9	6		3				3	
Washington	1		1						

ESCAPE

Totals	30	10	3	17				16	1
Androscoggin	5	3		2				1	1
Aroostook	2	1		1				1	
Cumberland	4	1		3				3	
Hancock	1		1						
Kennebec	3			3				3	
Knox	1			1				1	
Penobscot	2			2				2	
Waldo	1	1							
Washington	1	1							
York	10	3	2	5				5	

FORGERY

Totals	102	41	24	35	2	2		22	11
Androscoggin	20	4	4	11	1			5	6
Aroostook	1	1							
Cumberland	11	4		7				5	2
Franklin	4	3		1				1	
Hancock	1	1							
Kennebec	16	9		7		1		6	
Knox	3			3				3	
Oxford	20	2	18						
Penobscot	10	10							
Piscataquis	1			1				1	
Sagadahoc	4	3		1		1			
Somerset	4	2		1	1				1
Waldo	1			1					1
York	6	2	2	2				1	1

INTOXICATION

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	87	30	8	47	2	38		7	2
Androscoggin	8	2	3	3		3			
Aroostook	11	3		8		8			
Cumberland	22	11		10	1	9			1
Franklin	1			1		1			
Hancock	2	1			1				
Kennebec	3	1		2		2			
Knox	1			1		1			
Oxford	2		1	1		1			
Penobscot	11	5		6		2		4	
Sagadahoc	6	2	1	3		3			
Somerset	4			4		3		1	
Waldo	4	3		1		1			
Washington	4	1		3				2	1
York	8	1	3	4		4			

LARCENY

Totals	182	53	23	102	4	26	2	50	24
Androscoggin	15	3	1	11		3		3	5
Aroostook	22	4		18		6		10	2
Cumberland	27	13		12	2	4		8	
Franklin	3	2		1					1
Hancock	9	5	1	3				1	2
Kennebec	16	7		8	1		1	7	
Knox	1			1		1			
Oxford	11	1	6	4					4
Penobscot	29	3		25	1	8	1	12	4
Piscataquis	4	2		2				2	
Sagadahoc	3	2		1				1	
Somerset	14	4		10		2		5	3
Waldo	1	1							
Washington	3		3						
York	24	6	12	6		2		1	3

LIQUOR

County	Total (a)	Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
				Disposition					
Totals	66 4*	29	5	30 4*	2	24	2	1	3
Aroostook	6 1*			6 1*		3	2	1	
Cumberland	10 2*	3		5 2*	2	5			
Franklin	2			2					2
Hancock	1	1							
Kennebec	2			2		2			
Oxford	11	8	2	1		1			
Penobscot	12	4		8		8			
Piscataquis	1	1							
Sagadahoc	5	3		2		2			
Somerset	1			1		1			
Waldo	2	1		1		1			
Washington	1	1							
York	12 1*	7	3	2 1*		1			1

*(4) License suspended

MANSLAUGHTER

Totals	1			1				1	
Washington	1			1				1	

MOTOR VEHICLES

Totals	1259 3*	418	115	698 3*	28	633	11	48	6
Androscoggin	81	24	1	51	5	46		5	
Aroostook	86	34		50	2	49		1	
Cumberland	244	93		147	4	138	1	8	
Franklin	44 1*	16		26 1*	2	24		2	
Hancock	26 1*	9		16 1*	1	16			
Kennebec	41	6		33	2	27	1	5	
Knox	9	2	4	3		2		1	
Oxford	107 1*	31	15	59 1*	2	55	1		3
Penobscot	144	31		111	2	87	7	16	1
Piscataquis	4	1	1	2		2			
Sagadahoc	121	49	3	68	1	61		7	
Somerset	24	4	1	18	1	16	1		1
Waldo	16	6		10		10			
Washington	22	11	6	5		4			1
York	290	101	84	99	6	96		3	

*(3) License suspended

MURDER

County	Total (a)	Nol-Pros etc. (b)	Pending (c)	Disposition: Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	7 1*	1	3	3				3	
Androscoggin	1*								
Cumberland	1			1				1	
Franklin	2	1		1				1	
Oxford	1		1						
Penobscot	2		1	1				1	
Washington	1		1						

*(1) Mental disease (Committed to Mental, Health & Corrections)

NIGHT HUNTING

Totals	84	24	1	51	8	46	1	2	2
Aroostook	6	2		4		4			
Cumberland	8	3		5		5			
Franklin	3	3							
Hancock	7	3		4		4			
Oxford	15	7		6	2	5		1	
Penobscot	21	1		20		19		1	
Piscataquis	3	1		2		1	1		
Somerset	6	2		2	2				2
Waldo	3			3		3			
Washington	5	2	1	2		2			
York	7			3	4	3			

NON SUPPORT

Totals	1	1							
Aroostook	1	1							

RAPE

Totals	18	7	2	5	4			4	1
Aroostook	2	1		1				1	
Cumberland	4	2		1	1			1	
Franklin	1	1							
Hancock	1			1					1
Kennebec	2	2							
Oxford	1				1				
Penobscot	1				1				
Somerset	4		2	1	1			1	
Washington	1			1				1	
York	1	1							

ROBBERY

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	48	9	2	32	5	1	1	29	1
Androscoggin	4	1	1	2				2	
Cumberland	19	1		16	2			16	
Hancock	1			1				1	
Kennebec	1			1			1		
Penobscot	8	1		7		1		5	1
Waldo	1	1							
York	14	5	1	5	3			5	

SEX CRIMES

Totals	50	10	3	33	4	9		21	3
Androscoggin	1			1					1
Aroostook	11	2		8	1	4		4	
Cumberland	5	1		3	1			3	
Franklin	2	1		1				1	
Hancock	1	1							
Kennebec	9			8	1			8	
Oxford	4	1	1	2		2			
Penobscot	8	3		4	1	1		3	
Sagadahoc	1			1		1			
Somerset	2			2				2	
Washington	2		1	1					1
York	4	1	1	2		1			1

MISCELLANEOUS

Totals	851 1*	387	75	354	35	212	9	94	39
Androscoggin	43	16	9	17	1	7		7	3
Aroostook	83	33		47	3	27	3	12	5
Cumberland	138	88		45	5	31		12	2
Franklin	19	4		12	3	4		7	1
Hancock	43	24		17	2	14			3
Kennebec	46	14		29	3	8	2	19	
Knox	8	2		6		2		3	1
Oxford	41	20	7	13	1	8			5
Penobscot	169 1*	80		87	2	53	3	19	12
Piscataquis	22	6	6	8	2	2		5	1
Sagadahoc	29	15	1	13		11		2	
Somerset	23	9		14		6		6	2
Waldo	15	9		5	1	3	1	1	
Washington	39	8	16	12	3	11			1
York	133	59	36	29	9	25		1	3

*(1) Defendant deceased

1971 LAW COURT CASES

County	Name of Case	Outcome
Androscoggin	Not Reported	
Aroostook	Not Reported	
Cumberland	Not Reported	
Franklin	Not Reported	
Hancock	No Cases	
Kennebec	Adelbert R. Grondon	Pending.
	Edward Carey	Pending.
	Gerald LeBlanc	Pending.
	William E. Greaves	Appeal denied.
	Fred O'Clair	Pending.
	Frederick Tise	Pending.
Knox	Not Reported	
Lincoln	Not Reported	
Oxford	Not Reported	
Penobscot	Lloyd Gene Ellis	Appeal denied.
	Ralph A. Dyer	Pending.
Piscataquis	Roland Cookson	New Trial.
Sagadahoc	Not Reported	
Somerset	Not Reported	
Waldo	Not Reported	
Washington	Not Reported	

York	Peter Tsoukalas	Pending.
	Fred Benoski	Appeal sustained.
	Ronald Clark	Appeal sustained.
	Robert A. Cullen	Appeal sustained.
	Robert H. King	Appeal sustained.
	Romeo Santosuosso	Appeal sustained.
	Betty Grant	Pending.
	James Girard	Appeal denied.
	Douglas Dalphonse	Appeal denied.
	Charles Evans	Appeal denied.
	Arnold Goldman	Appeal denied.
	Caroline Perkins	Case remanded

1971
POST-CONVICTION PETITIONS

		STATE COURTS		FEDERAL COURT		
Type of Petition	Total	Superior Court	Appeal to Law Court	U.S.D.C.	U.S.C.A.	U.S. Supreme Ct.
Federal Habeas Corpus	14			Relief Denied 13 Relief Granted 1	*Petitioners'* Appeal Denied 1 Granted Appeal Pending 1 Cert. of Prob. Cause Denied 1	
Post-Conviction Habeas Corpus (State)	100	Relief Denied 53 Relief Granted 20 With-Drawn 11 Reported to Law Court 3 Pending 13	*Petitioners'* Appeal Denied 2 Granted 1 Withdrawn 2 Appeal Pending 5 Relief Granted Pet'r. 1			
Total	114					

1972

1972 ALL COUNTIES - TOTAL INDICTMENTS AND APPEALS (EXCEPT KNOX AND LINCOLN)

Crime	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	5535 1***	1938 1*	234 2**	3165 6****	183 6*	1803	48	718	596
Arson	23	9	1	11	1 1*	1		6	4
Assault and Battery	358	110	15	209	22 2*	72	10	60	67
Assault with Intent to Kill	17	5	2 2**	7	1*			6	1
Breaking, Entering and Larceny	619	212	10	381	16	7		186	188
Driving while Impaired	838 1***	138 1*	28	631	40	568	12	38	13
Drugs	687	305	30	343	9	95	17	130	101
Embezzlement	17	13		4				1	3
Escape	25	8	1	16				16	
Forgery	158	53	13	91	1	1		39	51
Intoxication	110	51	8	50	1	41		6	3
Larceny	191	83	6	100	2	31		28	41
Liquor	54	24		24 4****	2	20	1	2	1
Manslaughter	5	1		4				4	
Motor Vehicles	1358	448	44	819 2****	45	738	6	61	14
Non Support	6	6							
Rape	25	12	1	8	4			7	1
Robbery	57	24	2	29	2	1		28	
Sex Crimes	80	32	5	36	6 1*	8		17	11
Miscellaneous	907	404	68	402	32 1*	220	2	83	97

*(7) Not Guilty by Reason of Mental Disease or Defect
**(2) Not Competent to Stand Trial
***(1) Defendant Deceased
****(6) License Suspended

ARSON

County	Total (a)	Nol-Pros etc. (b)	Pending (c)	Disposition: Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	23	9	1	11	1 1*	1		6	4
Aroostook	3	1		2				1	1
Cumberland	5	4		1				1	
Hancock	2			2					2
Kennebec	2			2		1		1	
Penobscot	2	1		1					1
Somerset	1	1							
Waldo	4	1		1	1 1*			1	
Washington	1			1				1	
York	3	1	1	1				1	

*(1) Not Guilty by Reason of Mental Disease or Defect

ASSAULT AND BATTERY

Totals	358	110	15	209	22 2*	72	10	60	67
Androscoggin	26	10	1	15		7		6	2
Aroostook	41	8		29	3 1*	8	3	6	12
Cumberland	59	20		37	2	8		22	7
Franklin	11	4		7		2	2	1	2
Hancock	18	2	6	10		3		4	3
Kennebec	49	17		29	3	5	2	10	12
Oxford	14	2	3	9		1		2	6
Penobscot	34	6		27	1*	15		3	9
Piscataquis	2	1		1		1			
Sagadahoc	9	4	2		3				
Somerset	13	6	2	5		1			4
Waldo	16	6	1	8	1		2	3	3
Washington	11	6		3	2	2		1	
York	55	18		29	8	19	1	2	7

*(2) Not Guilty by Reason of Mental Disease or Defect

ASSAULT WITH INTENT TO KILL

Totals	17	5	2 2*	7	1**			6	1
Androscoggin	3		2*		1**				
Aroostook	1			1				1	
Cumberland	4			4				4	
Hancock	2		2						
Kennebec	1	1							
Oxford	1	1							
Penobscot	4	2		2				1	1
Washington	1	1							

*(2) Not Competent to Stand Trial
**(1) Not Guilty by Reason of Mental Disease or Defect

BREAKING, ENTERING AND LARCENY

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	619	212	10	381	16	7		186	188
Androscoggin	34	7	2	24	1			12	12
Aroostook	60	31		27	2	3		4	20
Cumberland	117	27		86	4	3		55	28
Franklin	16	7		6	3			3	3
Hancock	17	10	3	4				2	2
Kennebec	97	30		65	2			32	33
Oxford	16	11		5		1		2	2
Penobscot	106	27		79				23	56
Piscataquis	10	5		5				2	3
Sagadahoc	3	1			2				
Somerset	29	11		16	2			10	6
Waldo	39	16	2	21				18	3
Washington	11	2		9				3	6
York	64	27	3	34				20	14

DRIVING WHILE IMPAIRED

Totals	838 1**	138	28	631	40 1*	568	12	38	13
Androscoggin	22	2	1	19		16		3	
Aroostook	99 1**	12		85	2	75	1	9	
Cumberland	181	25		152	4	139	5	6	2
Franklin	22	2	5	14	1	11	1		2
Hancock	28	5	5	18		15		1	2
Kennebec	45	5		39	1	34	2	2	1
Oxford	26	7		18	1	18			
Penobscot	115	10		102	2 1*	86	1	14	1
Piscataquis	5			5		4		1	
Sagadahoc	33	6	4	19	4	19			
Somerset	46	10	1	32	3	30	1	1	
Waldo	35	5	2	26	2	23	1	1	1
Washington	17	5		10	2	10			
York	164	44	10	92	18	88			4

*(1) Not Guilty by Reason of Mental Disease or Defect
**(1) Defendant Deceased

DRUGS

Totals	687	305	30	343	9	95	17	130	101
Androscoggin	178	101	7	67	3	3	1	44	19
Aroostook	68	25		41	2	12	11	14	4
Cumberland	133	49		84		22	1	46	15
Franklin	1	1							
Hancock	28	5	5	18		15		1	2
Kennebec	50	20		30		1	3	11	15
Oxford	12	8		4		3			1
Penobscot	85	41		44		10		6	28
Piscataquis	15	3		11	1	6		3	2
Sagadahoc	6	1	1	4		4			
Somerset	6	3		3		1	1		1
Waldo	7		6	1				1	
Washington	9	6		3		3			
York	89	42	11	33	3	15		4	14

EMBEZZLEMENT

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	17	13		4				1	3
Aroostook	1			1				1	
Cumberland	1	1							
Kennebec	1			1					1
Penobscot	13	12		1					1
York	1			1					1

ESCAPE

Totals	25	8	1	16				16	
Aroostook	2			2				2	
Cumberland	6	3		3				3	
Hancock	2	2							
Kennebec	1			1				1	
Penobscot	3			3				3	
Piscataquis	1			1				1	
Somerset	5	1		4				4	
Waldo	2	1		1				1	
Washington	1	1							
York	2		1	1				1	

FORGERY

Totals	158	53	13	91	1	1		39	51
Androscoggin	23	7	3	13				4	9
Aroostook	8	2		6				4	2
Cumberland	33	8		24	1	1		8	15
Franklin	5			5				1	4
Hancock	4	2		2				1	1
Kennebec	9	1		8				3	5
Oxford	20	16	1	3				2	1
Penobscot	25	4	1	20				10	10
Sagadahoc	1		1						
Somerset	3	2		1					1
Waldo	10	4	3	3				2	1
York	17	7	4	6				4	2

INTOXICATION

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	110	51	8	50	1	41		6	3
Androscoggin	7	2	1	3	1	3			
Aroostook	13	4		9		8		1	
Cumberland	39	21		18		13		3	2
Franklin	1	1							
Hancock	6	4	1	1		1			
Kennebec	2			2		2			
Oxford	6	3	1	2		2			
Penobscot	11	5		6		5		1	
Piscataquis	1			1					1
Sagadahoc	4	1	2	1		1			
Somerset	1			1		1			
Waldo	6	5	1						
Washington	4	2		2		1		1	
York	9	3	2	4		4			

LARCENY

Totals	191	83	6	100	2	31		28	41
Androscoggin	6	2	1	3		1		2	
Aroostook	35	9		25	1	11		6	8
Cumberland	33	14		19		6		9	4
Franklin	13	5		8		2		4	2
Hancock	3	2	1						
Kennebec	10	7		3				1	2
Oxford	9	5		4					4
Penobscot	26	9		16	1	5		2	9
Piscataquis	6		3	3					3
Sagadahoc	2			2		2			
Somerset	5	3		2				2	
Washington	6	5		1					1
York	37	22	1	14		4		2	8

LIQUOR

Totals	54	24		24 4*	2	20	1	2	1
Androscoggin	3	1		2		2			
Aroostook	7	2		5		4		1	
Cumberland	10	7		1 2*		1			
Hancock	1	1							
Kennebec	2			2		2			
Oxford	3			3		2			1
Penobscot	5	2		3		2		1	
Piscataquis	3	2		1		1			
Sagadahoc	5	3		2*					
Somerset	1			1		1			
Waldo	5	3		1	1	1			
York	9	3		5	1	4	1		

MANSLAUGHTER

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	5	1		4				4	
Kennebec	1			1				1	
Piscataquis	1			1				1	
Somerset	2	1		1				1	
York	1			1				1	

MOTOR VEHICLES

Totals	1358	448	44	819 2*	45	738	6	61	14
Androscoggin	86	34	5	41	6	39	1	1	
Aroostook	94	26		66	2	58		8	
Cumberland	216	81		128	7	106	2	16	4
Franklin	46	9	4	32	1	31	1		
Hancock	86	28	6	48 1*	3	43		2	3
Kennebec	71	25		44	2	34	1	7	2
Oxford	84	31	1	46	6	46			
Penobscot	204	60		143 1*		119		23	1
Piscataquis	14	2		11	1	10		1	
Sagadahoc	69	11	16	41	1	41			
Somerset	35	12	1	22		21		1	
Waldo	56	13	2	40	1	38			2
Washington	48	24		23	1	22			1
York	249	92	9	134	14	130	1	2	1

*(2) License Suspended

MURDER

Totals	5 1*	1	1	2 1*	1			2 1*	
Aroostook	1*			1*				1*	
Penobscot	1	1							
Sagadahoc	1		1						
Somerset	1			1				1	
Waldo	1				1				
York	1			1				1	

* (1) Guilty of Manslaughter

NIGHT HUNTING

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	51	11		36	4	34			2
Aroostook	3			2	1	2			
Hancock	16	4		11	1	10			1
Oxford	6	2		4		4			
Penobscot	5			5		5			
Piscataquis	4	2			2				
Somerset	7	3		4		4			
Waldo	6			6		5			1
York	4			4		4			

NON SUPPORT

Totals	6	6							
Cumberland	5	5							
York	1	1							

RAPE

Totals	25	12	1	8	4			7	1
Aroostook	4	3		1					1
Cumberland	1			1				1	
Franklin	1	1							
Hancock	1			1				1	
Kennebec	5	2		3				3	
Oxford	1	1							
Penobscot	2	1			1				
Somerset	3	2		1				1	
Waldo	2	1			1				
York	5	1	1	1	2			1	

ROBBERY

Totals	25	10	2	12	1	1		11	
Androscoggin	4	1	1	2				2	
Cumberland	1			1				1	
Franklin	1	1							
Hancock	3	3							
Kennebec	2			2				2	
Penobscot	7	2		5		1		4	
Waldo	2	1		1				1	
Washington	1				1				
York	4	2	1	1				1	

SEX CRIMES

County	Total (a)	Disposition: Nol-Pros etc. (b)	Pending (c)	Guilty (d)	Not Guilty (e)	Fine (f)	Fine & Prison (g)	Prison (h)	Probation (i)
Totals	80	32	5	36	6 1*	8		17	11
Androscoggin	3		1	2					2
Aroostook	16	9		6	1*	3		2	1
Cumberland	9	2		7		2		3	2
Franklin	2	1		1					1
Hancock	1			1				1	
Kennebec	11	3		8		2		5	1
Penobscot	10	5		4	1			3	1
Sagadahoc	3	1			2				
Somerset	6	1		4	1			1	3
Waldo	6	2	1	2	1	1		1	
Washington	2	1		1				1	
York	11	7	3		1				

*(1) Not Guilty by Reason of Mental Disease or Defect

MISCELLANEOUS

Totals	907	404	68	402	32 1*	220	2	83	97
Androscoggin	78	25	33	14	6	7		5	2
Aroostook	98	32		66		52	1	11	2
Cumberland	184	78		98	7 1*	43		32	23
Franklin	17	11		5	1	3		2	
Hancock	63	27	20	13	3	9		1	3
Kennebec	67	36		30	1	9		9	12
Oxford	26	15		10	1	6			4
Penobscot	125	51		72	2	30		12	30
Piscataquis	17	8		9		7		1	1
Sagadahoc	10	4	4	2		2			
Somerset	24	10		14		12		1	1
Waldo	42	24	4	14		4		1	9
Washington	32	20		12		8		1	3
York	124	63	7	43	11	28	1	7	7

*(1) Not Guilty because of Mental Disease or Defect

1972 LAW COURT CASES

County	Name of Case	Outcome
Androscoggin	Reginald J. Berube	Pending.
	Cleveland J. Barlow	Pending.
	Steven Richards	Appeal Sustained.
	Richard Wing	Appeal Denied.
	Brent G. Medrano	Appeal Denied.
	Anthony Huard	Appeal Sustained.
	Joe M. Appleton	Pending.
	Henry Pritchett III	Pending.
	Joseph M. Cloutier	Pending.
	Raymond V. Thibodeau	Pending.
Aroostook	Carlton Allen	Conviction Sustained.
Cumberland	Paul Boyd	Appeal Sustained.
	Michael Carey	Appeal Denied.
	James Pearly Gervais	Pending.
	James Pearly Gervais	Pending.
	Michael Carey	Pending.
	Charles Emery	Pending.
	Walter Haycock III	Appeal Denied.
	Bion H. Pike and Herbert L. Pike	Pending.
	Gary A. Devoe and Charles H. Ryder	Pending.
	Hugh McKeough	Pending.
	Terrance L. Mihill	Pending.
	Arthur Howard Thomas	Pending.
	Robert W. Rush	Pending.
	Charles Peter Dyer	Pending.
	Frederick Brown	Pending.
Franklin	Robert D. Stoddard	Appeal Denied.
	Gary Staples	Appeal Denied.
	Barry A. Brann	Appeal Denied.
Hancock	Robert E. Shorey, Jr.	Pending.
Kennebec	Adelbert R. Grondon	Appeal Denied.
	Edward Carey	Appeal Sustained.
	Gerald LeBlanc	Appeal Denied.
	Fred O'Clair	Appeal Denied.
	Frederick Tise	Appeal Denied.
	Thomas Morton	Appeal Denied.
	Robert Gove	Appeal Denied.
	Richard F. Black	Appeal Denied.
	Albert J. Roberge	Pending.

	Robert O. Mower	Pending.
	Lloyd A. Burnham	Pending.
	Lloyd Wayne Northup	Pending.
	Elery Beale	Pending.
	Raymond C. Bickford	Pending.
Knox	Not Reported	
Lincoln	Not Reported	
Oxford	Not Reported	
Penobscot	Lynn Mellott	Dismissed.
	Ralph A. Dyer	Appeal Denied.
	Charles Keegan	Appeal Sustained.
	Robert Bothen	Appeal Withdrawn.
	Rodney L. Curtis	Appeal Denied.
	Charles Leo Smith	Appeal Withdrawn.
Piscataquis	Mark Bartlett	Pending.
	Charles Heald	Pending.
	Bernest York	Pending.
Sagadahoc	Not Reported	
Somerset	Not Reported	
Waldo	Roger Perkins	Appeal Dismissed.
	Roland Bailey	Appeal Dismissed.
Washington	Not Reported	
York	Roger Seavey	Pending.
	David Baldwin	Pending.
	David Krause	Pending.
	Arthur Martineau	Pending.
	Gary Thornton	Pending.
	Peter Tsoukales	Appeal Denied.
	Betty Grant	Appeal Denied.
	Michael Niemzyk	Pending.
	Roland Baillargeon	Pending.
	Robert Precourt	Appeal Dismissed.
	Leroy Madore	Appeal Dismissed.
	Clifford Jerome Young	Pending.
	Solime Corbeil	Appeal Dismissed.
	Roger Denis	Pending.
	William Lerman	Pending.

1972
POST-CONVICTION PETITIONS

Type of Petition	Total	STATE COURTS: Superior Court	STATE COURTS: Appeal to Law Court	FEDERAL COURT: U.S.D.C.	FEDERAL COURT: U.S.C.A.	FEDERAL COURT: U.S. Supreme Ct.
Federal Habeas Corpus	10			Relief Denied 9 Pending 1	*Petitioners'* Appeal Denied 0 Cert. of Prob. Cause 1	
Post-Conviction Habeas Corpus (State)	61	Relief Denied 4 Relief Granted 14 Pending 33	Pending 3			
Total	71					

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