

# MAINE STATE LEGISLATURE

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DOCUMENTS

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THE LEGISLATURE,

OF THE

STATE OF MAINE,

DURING ITS SESSION

**A. D. 1838.**

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**EIGHTEENTH LEGISLATURE.**

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**NO. 2.**

**SENATE.**

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**OPINION**

OF THE

**J U S T I C E S**

OF THE

**SUPREME JUDICIAL COURT.**

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[G. ROBINSON, Printer.]

## STATE OF MAINE.

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IN SENATE, January 11, 1838.

*Ordered*, That the Justices of the Supreme Judicial Court be requested to give their opinion on the following questions:—

1st. 'Is it competent for the two branches of the Legislature to admit evidence to prove that a return of the votes for Governor, given in any city, town or plantation, made to the office of the Secretary of State, in the form, and within the time, prescribed by the Constitution of this State, is not what it purports to be?—And if so, under what circumstances, and to what extent?'

2d. 'Is it competent for the two branches of the Legislature to receive parole evidence to invalidate, contradict, or impeach the returns of votes for Governor, given in any city, town or plantation, made to the Secretary of State, in the form and within the time, prescribed by the Constitution and laws of this State—except in cases of fraud suggested or alleged?'

# OPINION.

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*To the Hon. the Senate of the State of Maine:*

THE undersigned, Justices of the Supreme Judicial Court have taken into consideration the questions, propounded to them by the Senate on the eleventh instant.

The Constitution has prescribed at what time, by whom, and in what manner, the Governor and the members of both branches of the Legislature shall be elected. It has also provided, that the Selectmen of towns shall preside at meetings, held for this purpose, and has further charged them with certain duties in receiving, sorting, counting and declaring the votes, and with the assistance of the Town Clerks, in certifying and making due return of the result, in each town respectively.

In the election of Governor, the returns are to be made to the Secretary's Office in each year, thirty days at least before the first Wednesday in January. And on that day the Secretary is required to lay the same before the Senate and House of Representatives, "to be by them examined, and in case of a choice by a majority of all the votes returned, they shall declare and publish the same." The evidence to be submitted to the two houses, and the source from which it is to be derived, are prescribed by the Constitution, as the best, which could be devised, from which to ascertain who, if any one, has received a majority of the

suffrages of the electors. The result of this evidence the two houses are required to declare; and no authority is in terms conferred upon them to receive any other evidence. Nor does it appear to the undersigned, that it is to be derived by fair implication. It would open the door to the admission of testimony of an inferior character, and would expose the most solemn public proceedings and documents to be affected by fraud and perjury. And if received to vary the returns, the result, thereupon declared, would not be that indicated by the returns, but so far as they might be affected, one derived from other sources.

The Legislature assembles, at the time appointed by the Constitution, to pass such resolves and to enact such laws as the public good requires. It was evidently contemplated, that the organization of the government would be speedily completed, that the Legislature might, as soon as practicable, proceed to the proper business, appertaining to that department. A day is appointed, upon which to declare on whom the election has fallen, if one has been effected by the people. And although, by the general provisions of the Constitution, there may be an adjournment from day to day, until the organization of the government can be completed, it is very manifest, that it was intended, that the result of the votes returned for Governor should be declared, as soon as the two houses shall have had opportunity to examine the returns; for the Governor is to hold and exercise his powers for one year from the first Wednesday in January. To effect this object, the Constitution has taken care, that on that day the proper evidence shall be laid before the Senate and House of Representatives, from which the result is to be ascertained.

If it is competent for them to look elsewhere for other evidence, upon a suggestion of fraud or mistake, that

suggestion may be made by irresponsible persons, from any and from every part of the State, for the mere purpose of delay, by which a decision might be indefinitely protracted, at great expense to the public, while the powers conferred upon the Governor elect, for the constitutional period are withheld from him, and the public deprived of the benefit of his services. While an inquisition is going on, as to the purity, integrity and correctness of the proceedings of the several cities, towns and plantations in the State, and of their officers, a portion, if not the whole, of the annual period, for which the Governor is elected, may be consumed and lost. It appears to the undersigned, that upon this construction, there would be great hazard, that the public would be deprived, for a portion of the year, of a regularly organized government; a portion, too, embracing that period of time, when the Senate and House of Representatives are required to assemble for the purposes of legislation. The Constitution would thus be found inadequate to secure to the people, from year to year, the government for which it provides.

Another objection may arise, from the difficulty of verifying satisfactorily disputed facts, covering a broad field of enquiry, and involving much of the law of evidence, before legislative bodies, brought together and organized for a different purpose, upon which the undersigned forbear to enlarge.

It may be urged, that the construction, suggested by the undersigned, would leave the public exposed to fraud or mistake, on the part of the Selectmen. It might, we apprehend, be a sufficient answer to say, that it was for the framers of the Constitution to determine, whether the exigency of the case required, that the returns should be

open to be controverted before the two Houses, and made thereupon subject to their revision ; and that the existence of this power is negatived, not only by the silence of the Constitution upon this point, but by its express requirement, that the two Houses should declare and publish who, if any one, has a majority of the votes returned.

But the public are not without safeguards and sanctions, for the preservation of the purity of elections ; and if they are found inadequate, they may be strengthened and increased by the legislative power. The Selectmen are the representatives of the people, in the discharge of the duties confided to them. They are selected by them for their capacity, probity and fidelity. Trusts of great importance, bearing upon the immediate interests of the citizens, are committed to their care. They manage the prudentials of their respective towns ; and usually also discharge the duties of Assessors. No class of public agents are nearer to the people, or receive more unequivocal proofs of their confidence. In regard to elections, they act in the face of the public, subject to vigilant and constant inspection.

There must be faith and credence given to public functionaries, in their proper department, acting under the responsibilities, to which they are subjected. Whatever is authenticated by them, in the form prescribed by law, is regarded as evidence of the highest character. It closes all controversy, in regard to facts thus verified. This is a principle, adopted and practised upon in courts of justice. Without it, the evils and expense of litigation would be greatly aggravated.

The Constitution has provided, that the Legislature should be seasonably furnished with the best evidence, the nature of the subject admitted. The technical rule,



which requires the best evidence, is not intended to shut out, but to establish, truth. It may be well admitted, that it is not a rule, which precludes the possibility of error. Perfection does not belong to the present condition of mankind. It is adopted, because the experience of ages has demonstrated, that it is upon the whole most favorable to the establishment of truth. By relaxing it, truth might in a few possible cases be promoted; but it would, in a much greater number, be perverted.

If the character, and official standing of the Selectmen of towns, and the publicity of their proceedings, are not a sufficient guaranty for their fidelity and integrity in regard to elections, it is competent for the legislative power to provide other sanctions. This has already been done to some extent; and penalties may be increased, at the discretion of the Legislature.

But in making these intimations, as to the inviolability and conclusive character of the returns, the undersigned doubt not, that it is competent for the two Houses to be satisfied, that they come from the proper official sources, and are not forgeries. If, for instance, they purport to come from towns or plantations, which have no existence, or from persons not clothed with the authority they assume, they are not entitled to be respected as constitutional returns. So also in our judgment, any return may well be rejected as a forgery, if it contains a list of a much greater number of votes, than the town, from which it purports to come, can possibly from its population, have of legal voters.

Upon the whole, the undersigned, in relation to the first question, propounded to them, answer, that in their opinion it was not the design of the Constitution, and therefore is not competent for the two branches of the Legislature to

admit evidence to prove, that a return of the votes for Governor, given in any city, town or plantation, made to the office of Secretary of State, in the form, and within the time, prescribed by the Constitution of this State, is not what it purports to be; and, as a necessary consequence, that the parole testimony, which forms the subject of inquiry in the second question, is inadmissible, without any qualification whatever. All which is respectfully submitted.

NATHAN WESTON,  
NICHOLAS EMERY,  
ETHER SHEPLEY.

JANUARY 15, 1838.



## STATE OF MAINE.

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IN SENATE, January 16, 1838.

THE foregoing opinion of the Justices of the Supreme Judicial Court, on questions proposed to them by the Senate on the 11th instant, was read and laid upon the table, and

ORDERED, That 1000 copies of the same be printed for the use of the Legislature.

[Extract from the Journal.]

ATTEST :            WILLIAM TRAFTON, *Secretary.*