DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE,

DURING ITS SESSIONS

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TWENTY-SECOND LEGISLATURE.

NO. 30.] [SENATE.

OPINIONS

OF THE

JUSTICES

OF THE

SUPREME JUDICIAL COURT.

[Wm. R. Smith & Co.....Printers to the State.]

STATE OF MAINE.

In Senate, February 4, 1842.

Ordered, That the Justices of the Supreme Judicial Court be requested to communicate to the Senate their opinions in writing, upon the following questions:

1st. Did the Legislature of 1841, in forming a district for the choice of Senators, by the addition to the county of Oxford of portions of other counties, viz: the counties of York, Cumberland and Franklin, conform "as near as may be" to county lines according to the true meaning and intent of the constitution?

2d. Was it competent for the Legislature of 1841, in forming the counties of Kennebec and Waldo into districts for the choice of Senators, to form one district by the addition of a part of Waldo county to the county of Kennebec—and one district out of the remainder of Waldo county, when by the addition of a *smaller* part of the county of Kennebec to the county of Waldo, one district could have been formed out of the county of Waldo and the part of the county of Kennebec so added, and another district out of the remainder of Kennebec county, and the apportionment of Senators would have been equally proportioned to the number of inhabitants?

3d. Can the Legislature in apportioning the State for the choice of Representatives, deprive any town of the right of representation in each and every year, which does not determine against a classification with any other town or towns, and which does not apply for a separate assignment of its

right of representation for the portion of the time to which its population entitles it?

4th. The apportionment for the choice of Representatives made in 1841 being only for one year, under the provision of the Constitution, which directs that when the number of the House reaches 200 it shall be by the next Legislature, either increased or diminished as the people may require—was it competent for the Legislature of 1841 in apportioning for the choice of Representatives, to exclude any town from a voice in the Legislature of 1842, whether by its corporate powers it did or did not apply for a separate assignment of its right of representation?

5th. Was it competent for the Legislature of 1841, in apportioning for choice of Representatives, to exclude from a voice in the Legislature of 1842, the town of Buckfield in the county of Oxford, which contains by the Census of 1840 more than 1,500 inhabitants, which did not determine against a classification with other towns, and which did not apply for a separate assignment of its right of representation for the proportion of time to which its population entitles it?

And whereas certain towns which did not determine against a classification with other towns, or apply for a separate assignment of their right of representation, were by the apportionment of 1841 not allowed a Representative themselves, or classed with other towns, but entirely excluded from a representation in certain years, and particularly from a Representative to the present House of Representatives—is it competent for the present Legislature to assess a tax upon such towns?

OPINIONS.

To the Honorable the Senate of the State of Maine:

THE undersigned, Justice of the Supreme Judicial Court, having had under consideration the resolves of the 4th of February, 1842, passed by your body, propounding to the Justices of said Court certain questions on the subject of the apportionment of 1841, for the election of Senators and Representatives, begs leave respectfully to reply, as follows:

The constitution provides, that, for the choice of Senators, "the districts shall conform, as near as may be, to county lines; and be apportioned according to the number of inhabitants." This provision, as to county lines, cannot be regarded as altogether specific and precise, although by no means to be lost sight of in making an apportionment. The words, "as near as may be," show that something was to be left to the discretion of the Legislature; and are to be regarded as in some measure directory; and not as containing a mandate, of a nature so explicit, as that obedience must follow without consideration. Indeed, the framers of the constitution could not be expected to foresee the variations, which might, and indeed must, inevitably take place, in reference to the state of the population, at different periods, and in each of the different counties contained in the State; and well understood that the lines of counties would also be continually changing; and that new counties, from time to

time, would be created, of various conformation, and with various relative localities. Hence, much was necessarily confided to the discretion of the Legislature, in making the contemplated districts for the choice of Senators.

The other branch of the requirement, viz: "and be apportioned according to the number of inhabitants," is more specific, and more absolute in its terms, and would seem to contemplate the use of nothing but arithmetical rules to ascertain how it should be carried into effect. Yet even this requirement has been uniformly, and from imperious necessity we are bound to presume, regarded as allowing of the exercise of some discretion on the part of the Legislature. And, indeed, it can hardly happen, where legislative action is required to effectuate the object provided for in the constitution, that the exercise of some discretion should not be implied. If it were otherwise, no legislative action would be requisite. The framers of the constitution, in such case, would have prescribed what should have been done without it.

The first apportionment, under the constitution, was made in 1821. County lines were not then broken in upon. But the apportionment, according to numbers, notwithstanding the imperative and unconditional nature of the mandate, was no further regarded than, in the exercise of a sound discretion, was deemed essential. It was provided that each county should elect a certain number of Senators. It could not be expected, that each county should contain precisely the required number of inhabitants for the purpose. Some counties contained many thousands over the requisite number, and some many thousands less. The three largest counties had, together, a surplus of population in the aggregate, nearly, if not quite, sufficient to entitle them to an additional

Senator;—while two others, which were, each, allowed to elect two Senators, although deficient in population, nearly in equal proportions, to an amount in the aggregate, nearly equivalent to what would have been requisite to have constituted a district for the choice of one Senator.

In this a discretion must have been exercised; and exercised, too, in a particular, in which no authority from the terms used, as in the case of county lines, was implied for the purpose. But the Legislature were impressed, doubtless, with the belief, that such discretion was necessarily conferred. They, doubtless, saw, that county lines must be broken in upon, or that the numbers of the population, in each county, must be, in some measure, disregarded, and in the exercise of their discretion they preferred the latter.

But in the apportionment, which took place in 1831, the Legislature exercised its discretion in both particulars. It avoided breaking in upon county lines, in all the counties but two, viz: Hancock, and Washington; although the population of the former greatly over ran in some of them, and in others as largely fell short of the number required. Washington, and Hancok were divided into three districts, without regard to any dividing lines between them; and each district, so formed, was allowed to elect a Senator; although the population of both counties together, fell some two or three thousand short of the number requisite to entitle them to elect three Senators.

Of this exercise of the discretion confided to the Legislature, in making the apportionment of 1821, and 1831, it is not known that any complaint, on constitutional grounds, was ever made; and if the question were otherwise doubtful, might be deemed, in reference to the article under consideration, a practical construction of the constitution, almost coeval with its adoption.

When it becomes necessary to depart from county lines, in the formation of districts, a selection must be made for the purpose, of towns to be taken from one county to be added to another. What towns should be selected must depend upon a variety of circumstances. One set of towns might contain more of the population, and another set less than the required number.

It might become necessary even to select towns that were not actually contiguous to the proposed district, in order to supply the number of the population required. It might happen that the number needed must be taken from several counties; and that, moreover, numbers must be drawn from the same counties to supply other districts; in which case it would become a question, as to how many could be spared from the one county, or the other, to meet the demands of the lesser county. It might happen, in case one county should have the lesser fraction, and adjoin another which had the greater fraction, that, many of the towns belonging to the latter, might be so nearly interlocked by the towns of the former, as, in the exercise of a sound discretion, all would agree, that it would be more expedient and judicious to assign to the former the towns so nearly interlocked, and thereby make a compact, well formed district, than that the contrary should take place. Again, it might happen that a county, with a population too small to form a district, might be entirely surrounded with counties each having the precise number, or sufficiently so for practical purposes, requisite to form a district. Here the Legislature must exercise a discretion. It might be necessary to take from one of such counties a certain number, to make, in connection with the smaller county, a district. The discretion of the Legislature must be exercised in determining which of the counties, hav-

ing the proper number for districts, should be broken up to supply the smaller county with the requisite number; and from what other county, the county so broken up, should have an accession, adequate to the formation of a district. And, in the exercise of such a discretion, it might be deemed proper, in reference to such small county, not to infringe upon the adjoining counties; they having just the number requisite to form districts; but to connect the small county with a fraction of some remote county, and thereby to form a district; and this might be deemed "conforming to county lines as near as may be."

And again, it may happen, as it did at the apportionment of 1831, that, in the exercise of legislative discretion, when two counties lie contiguous, having each a fraction, differing in amount, but, together, sufficient to form a district, it will be considered to be a dictate of sound discretion, that neither the counties having the small fraction should yield to the other, nor *vice versa*, but that a new district should be formed of the two fractions; and that thereby county lines must, in a good measure, be disregarded. In fact, it is utterly impossible to foresee all the cases, which may in the process of time occur, which may call for the exercise of a sound discretion, on the part of the Legislature, in departing from county lines, and also from the numerical population, in order to the discreet formation of districts for the choice of Senators. All this seems to prove, incontrovertibly, that legislative discretion was intended to be conferred in reference to the formation of districts for the choice of Senators.

It may be urged, that this exercise of discretion is of a dangerous tendency—that it may be abused and perverted to nefarious purposes. But this may be said, with equal propriety, of every other power delegated to the legislature. If

such power should be abused, in any case, the remedy is with the people. Those guilty of any such outrage will be very likely to become, in time, the victims of their own misconduct. In popular governments this, and the right, which it may be believed the people will exercise, of displacing bad servants, are the great checks to the abuse of power.

It is, then, the opinion of the undersigned, that the first and second of the questions propounded must be answered in the negative, there appearing in neither of the cases stated, so far as is discernable by the undersigned, to have been anything, other than the exercise of that discretion, which results necessarily from the power delegated to the Legislature. Whether this discretion was judiciously exercised, in the instances referred to, it is believed, was not intended to be submitted to the consideration of the undersigned.

It may be deemed superfluous to add, that, as to the third proposition, contained in the resolves, we see no provision in the constitution, either express or implied, that would authorize any districting anew for the choice of Senators, excepting at the periods expressly named in that instrument. When the constitution designates, in express and explicit terms, the precise time when a fundamental act shall be done, and is utterly silent as to its performance at any other time, we are not aware of any ground, upon which the doing of it can be authorized, at any other time. By article v., of part second, section 2, of the constitution, counsellors, to advise the Governor, are required to be chosen on the first Wednesday of January, in each year. Aside from the article ix., section 4, of the same instrument, would any person undertake to maintain, that these officers could be chosen, on any other day? And, this special provision being made therein, in reference to the election of counsellors and some other officers, and none

such being made in regard to any other time for the apportionment of Senators, goes far to negative the presumption, that it could be done at any other period than the one prescribed. In such case an agency is created, to be performed by a certain body of men, and at a certain time. Can any other body of men, to whom the power is not delegated, assume the power to perform it, and proceed to do it at a time different from the one prescribed.

It may be urged, that, if the districting for the choice of Senators should not take place as the constitution provides, and there be no power to form districts at any other time, the government would be at an end. And it might be so. But so it would be in numerous other extreme cases which might be put, and which would be equally remediless.

The preservation, and permanency, however, of every republican government, relies upon the presumption, that the people will do their duty by electing certain functionaries, and that those functionaries will do what is enjoined upon them, in order to uphold, and continue the established system of government.

To the fourth proposition, in the resolves contained, the undersigned replies as follows. The constitutional provision, relative thereto, seems clearly to contemplate, that no town should be deprived of its annual representation, without its consent, manifested in due form, by some corporate action, at a legal meeting for the purpose. Whether such course has been pursued in the numerous instances, in which, towns liable to be classed with other towns, at the different apportionments of Representatives, have been authorized to be represented singly, for a portion only of the period for which the apportionment was made, is unknown to the undersigned. And whether it has been customary, in case one of the two

towns, liable to be classed, has signified its desire to be provided with a separate representation, for a portion of the time, to grant such request as of course, and then consider, that, from necessity, the other town must be authorized to send a representative for the residue of the time, is also unknown to the undersigned. But in either case it could not be considered that the procedure was in strict conformity to the requirement of the constitution. The Legislature are not absolutely obliged to grant a request by a town, liable to be classed, for a separate representation. The constitution provides, only, that they may do it. And the undersigned would consider it erroneous to grant such request, unless the rights of the other town, liable to be classed with it, were preserved. Upon granting the request of one of two towns, liable to be classed, for a separate representation, care should be taken, that the other should be united to some other town or plantation, liable to be classed. If that could not be done the prayer of the town applying for separate representation should not be granted. But the town, so applying, should be suffered to remain united with the town, which had not applied.

It may be considered, therefore, in answer to this proposition, as the opinion of the undersigned, that the Legislature conducting as therein supposed, would be doing violence to the rights of the town, liable to be classed, and which had not applied for a separate representation.

As to the fifth proposition, contained in said resolves, the undersigned does not understand, that the apportionment of Representatives, in 1841, was made for one year only. It does not purport to be so made; and but for an amendment of the constitution, adopted since the passage of the act of apportionment, might have remained in force for the term of

ten years. At the time of its passage it was liable, by the provisions of the constitution, then existing, to be affected in its duration, only, by a determination of the people, that the number of representatives should be increased or diminished, which they might have omitted or refused to do. The undersigned must, therefore, answer to this proposition, that, if a town, liable to be classed, had applied, in due form, for a separate representation, for a portion of the subsequent period of ten years, and the application could have been yielded to, without doing violence to the rights of another town, with which it was liable to be classed, it was competent for the Legislature, making the apportionment of 1841, to grant it; although the result might have been, that the town would, thereby, be deprived of a Representative in 1842.

To the sixth proposition, in said resolves contained, the undersigned replies, that it does not appear, in the case therein put, that 1500 inhabitants, or any other number, contained in Buckfield, were sufficient to have entitled it to elect a Representative, in each and every year, for the whole period of ten years, then next ensuing. If it had not the requisite number for such purpose, it could not be entitled to vote in the election of a Representative, unless classed with some other town or plantation for that purpose; or unless it had been allowed, on its own application for the purpose, to elect a Representative for its proportion of the period, between the time of making the apportionment of 1841, and the making of the next general apportionment; and could not then have elected a Representative for 1842, unless that year had been named as one in which it might send a Representative.

For any further answer to this proposition, the undersigned begs leave to refer to the answer to the fourth proposition.

To the seventh proposition, in the said resolves contained, the undersigned replies, that the omission, whether from one cause or another, to be represented in 1842, of any particular town, could not affect the right of the Legislature to impose a general tax. It has been said, in former times, that taxation and representation should go together. This adage, however, was introduced into this country under a very different state of things from that alluded to in the resolve in question. There was a time when our forefathers were attempted to be subjected to a taxation, by a legislative body, in which they were not, merely casually and for a single year deprived of representation, in one branch of it only; but the proposition was to tax them forever, without allowing them the right of representation, at any time, in any form, or in either branch of the legislative body. To this the case indicated in the resolve in question is utterly dissimilar. In one branch of the Legislature, and in the election of the chief magistrate, which may be considered as another branch, the inhabitants of the towns alluded to, are represented; and as to the other branch, the deprivation is casual and temporary only. If those towns had applied for, and had succeeded in obtaining a separate representation, it might have happened, that taxes would be imposed in years in which they would not have been represented. And there might be various casualties, which would prevent their being represented in one or the other branch of the Legislature, at the time taxes were imposed. It might happen, even, that some town or plantation might be overlooked, or be omitted by some misconception, as happened probably in the cases alluded to, in the general apportionment, and have no representation in the House of Representatives. This could form no impediment to the imposition of a tax, which

must be general. We, therefore, answer this proposition in the negative.

EZEKIEL WHITMAN.

In answer to the questions proposed to the justices of the supreme judicial court by the Senate and stated in their order bearing date the fourth day of February, 1842, the undersigned would observe; that he concurs in the result, to which the other members of the court have come, in answer to the last four questions; and that he is unable to do so in the opinions expressed on the first three questions.

By article four, part two, section two, of the constitution, it is declared, that the Senators shall "be apportioned according to the number of inhabitants," and that the Legislature for the purpose of electing them shall cause the State to be divided into districts, which "shall conform as nearly as may be to county lines." The intention appears to have been to make it obligatory upon the Legislature to arrange the districts in such a manner, that their boundary lines should vary as little as might be practicable from the established lines of the counties; and not to restrain it so as to prevent an equal apportionment according to the number of inhabitants. When the required number of inhabitants are not found within a county, its boundary lines must yield so far as to embrace the required number. In considering and applying the elements of an apportionment, regard must be had to the whole number of inhabitants in the State, to the several counties and their boundaries, and to the several towns and plantations. To determine whether a district could be formed so as to embrace one county and parts of one, two,

or three, other counties ; the Legislature must take into consideration the effect, which it would have upon those and all other counties as well as upon the equality of the apportionment. If an equal apportionment throughout the State could not have been made without forming a district with such deviations from county lines, the Legislature might have formed such a district as is stated in the first question, without any violation of the constitution. For the mere fact, that the whole of one county and parts of three other counties were formed into one district, would not necessarily prove, that the Legislature did not conform as nearly as might be to county lines. The first question does not state, whether an equal apportionment could have been made so as to conform more nearly to county lines in this particular district. And whether one could have been so formed appears to the undersigned to be rather a question of fact than of law ; and one which must necessarily be decided by the Legislature making the apportionment. Such decision, however, if made in manifest disregard of the constitutional provision, would like other unconstitutional enactments, be void, and not binding upon the people or upon a subsequent Legislature. When the legislative department decides upon matters of fact within its sphere of action, it is not the province of the judicial department to review such decision, and come to the same or to a different conclusion. And it is not perceived how it could do it in this case, without attempting to take the duties of the Legislature upon itself, and to arrange an apportionment throughout the State in every mode, which might be supposed to form districts more nearly coincident with county lines than the one alluded to. This being a legislative duty, the undersigned does not feel at liberty under the provisions of article third and section second of the constitution, to attempt

the performance of it. And therefore answers the first question, that he is not authorized to conclude from the facts stated in it, that the Legislature of 1841 did not "conform as near as may be to county lines according to the true intent and meaning of the constitution."

The second question is considered as inquiring, whether the counties of Kennebec and Waldo could be constitutionally so formed into districts for the choice of Senators as to form one district by annexing part of Waldo to Kennebec, and another district from the remainder of Waldo; when one district might have been formed by annexing a part of Kennebec to Waldo smaller than the part taken from Waldo and annexed to Kennebec; and as asserting, that in the latter case "the apportionment of Senators would have been equally proportioned to the number of inhabitants." It will be perceived, from what has already been stated in answering the first question, that the undersigned does not feel at liberty to enter upon the legislative duty of ascertaining, whether districts could or could not have been formed from the territory composing the counties of Kennebec and Waldo more nearly in conformity to the county lines of those counties, than the districts which were formed. The question does not ask him to do so; and he confines himself to the question. And he considers, that the practicability of making an equal apportionment according to the number of inhabitants by annexing to Waldo a part of Kennebec smaller than the part taken from Waldo and annexed to Kennebec, is decided by the statement of the question. The constitution is considered as requiring, that the senatorial districts should be territorial districts, the lines of which could be traced upon the surface of the earth; and that they should be formed out of contiguous territory. If the constitution is to be regarded as requiring,

that the districts should conform as nearly as may be to county lines according to the territory, and not according to the number of inhabitants included in them; for the purpose of deciding the question it only remains to prove, that the lines of the districts formed as proposed by the question would necessarily more nearly conform to the county lines of both those counties, than the lines of the districts, as they are stated to have been formed.

And this is believed to be capable of being made certain by geometrical rules. For if a part of the territory of the county of Kennebec be annexed to the county of Waldo smaller than the part of the territory of Waldo, which was annexed to Kennebec, the county lines of Waldo would be departed from by extending them to embrace such part of Kennebec in a less degree, than they would be by contracting them to exclude the part of Waldo annexed to Kennebec. And the superficial contents of the district so formed, would more nearly correspond to the superficial contents of the county of Waldo, than the superficial contents of a district formed from the remainder of Waldo after taking off the part annexed to Kennebec would. And a like result, both as to lines and superficial contents, would be obtained by comparing the county of Kennebec with the district to be formed from the remainder of that county. To this reasoning it may be objected, that if such mathematical rules are to be considered as determining, when county lines are conformed to as nearly as may be, a district might be formed from one county and certain towns in another adjoining county, which might be so selected as to extend by very irregular lines nearly across the latter county almost separating it into two parts; and yet there be no violation of these rules. But the constitution designed, and does in spirit, if not in the let-

ter, require, that the districts should conform as nearly as may be to county lines in all respects, so that every part of the district lines should be as little distant from the county lines as may be practicable, while the equality of the apportionment is preserved. If the true construction of the constitution be, that it requires, that the districts should conform to county lines as nearly as may be having regard to the number of inhabitants and not to territorial limits; it is not perceived, that a similar result must not be obtained.

For the second question must be presumed to have for its basis a constitutional mode of proceeding to form the two senatorial districts. And on the construction of the constitution, now under consideration, the terms "smaller part," used in the question, must be considered as having reference to a smaller part of the population or number of inhabitants, instead of a smaller part of the territory. And in such case it is unnecessary again to recur to mathematical illustrations to prove, that on this construction of the constitution, by the annexation of a smaller number of inhabitants to the county of Waldo, than were taken from it, the county lines would be less departed from by extending them than by contracting them to exclude the larger number. And that a similar result, by an inverse ratio, would take place with respect to the county of Kennebec, and the district to be formed from the remainder of it. Whichever may be considered as the true construction of the constitution, the spirit of the rule, as well as the letter, would seem to require, that when any apportionment for the State is regarded as one system, as it should be, that it should present the least practicable departures, considered as a whole as well as in districts, from county lines. If this be not necessary, the Legislature, instead of separating from the county of Franklin a part containing the

few thousands of inhabitants more than sufficient to entitle it to send one Senator, and annexing it to some other county; might take a part of Kennebec three times as large and annex it to Franklin to form a district to send two Senators, if the remainder of Kennebec could have been formed into a district with a less number of Senators apportioned equally upon the remaining number of inhabitants. And more than half of a small county might be annexed to a large one to form a district, when a small portion of the latter might be annexed to the former to form a district, and the equality of the apportionment be preserved. These are put as examples, merely to illustrate a course of legislation, quite as objectionable in many other cases, which might be pursued, if there be no rule binding upon the Legislature and forbidding in any case a departure from it by the exercise of an enlarged discretion not limited strictly to that, which may necessarily arise, while acting upon the rule. The rule prescribed in the constitution for the apportionment of the Senate is not considered, by the undersigned, as an impracticable one; but as capable of being applied without serious difficulty. And so far as it relates to county lines, in nearly if not quite all cases, with mathematical certainty and exactness. If, however, cases could be presented, in which he perceived that there must be a slight departure from the rule from the necessity of the case, he would not feel at liberty to answer this question differently, from what he now does; because the question submitted does not present or imply, that any such difficulty could arise in applying the rule to the case presented by it. It may be said, that the terms used in the constitution that, "the districts shall conform as near as may be to county lines," permit a departure from them; and that how far it shall extend is submitted to the

sound discretion and judgment of the Legislature. But the very language limits, or more properly prohibits, any such discretion by declaring, that the conformity shall be "as near as may be;" that is, as near as it may be practicable to make them, having regard to the number of inhabitants. The language must have been used to define the rule, not to permit a departure from it at discretion, however soundly and justly exercised it might be. If there may be a sound and a just exercise of discretion, it cannot be overlooked, that there may be also an unsound and unjust exercise of it, if it be permitted at all in any other case, than when it arises out of an absolute moral necessity. And between such a discretion and any other, there is this great and most favorable distinction. It finds its own certain limit in the necessity, which gave rise to it; and it can extend no further than that necessity requires that it should; and it is not therefore liable to be abused. And this is the only discretion, that can in this case be admitted. Again, the constitution requires, that the Senators "shall be apportioned according to the number of inhabitants," and it may not in all cases be possible exactly to conform to this rule. It may not at any time of making an apportionment be possible to assign to each senatorial district the exact number of inhabitants required for any number of Senators without dividing towns or separating their inhabitants, which is inadmissible. And here also it may be said, there must exist a discretion to be exercised by the Legislature making an apportionment. That power, which a legislative body is compelled to exercise by such a moral necessity cannot properly be considered as discretionary. If, however, it be so designated, it is a discretion like that last named, limited in the same manner, and not subject to be abused. There can be no warrant for the exercise of

this kind of discretion, if it may be so called, beyond what is required by the case to be provided for. If the Legislature has any other discretion, it is necessarily an unlimited one in practice, however it may be attempted to limit it in theory. And the provisions of the constitution relating to this matter must become in practice merely directory. And an apportionment must then be considered as constitutional, although the county lines should be wholly disregarded and the number of inhabitants required to elect a Senator should be very unequal. It is not intended to intimate, that any one contends for a construction, that would knowingly authorize such results; but it is believed, that such is the legitimate and practical tendency of admitting any other discretion than that, which arises out of an absolute moral necessity. Any other discretion would in effect repeal or annihilate that clause in the constitution, which prescribes the rule for an apportionment, and would therefore violate one of the fundamental rules of interpretation, that effect is to be given to all the language, if it be possible. And without permitting that clause to have effect upon the legislation, the constitution would no longer secure the same rights, that are now believed to be secured; nor would it practically be the same instrument of government.

It may be said, that the manner, in which the power has heretofore been exercised by the Legislature, exhibits a practical construction of the constitution favorable to the exercise of a discretion more enlarged and different from the one herein admitted. If each past exercise of the power should be wholly irreconcilable with the provisions of the constitution in particular cases, if the clause alluded to should be considered as excluding a more enlarged discretion; those exercises, so far as they may be regarded as unauthorized by the

constitution, have not been sufficiently well known to be so, and numerous, and free from complaint to authorize the conclusion, that the construction, which would sanction them, would be a correct one, or that the people had acquiesced in it. The second question is therefore answered in the negative.

In attempting to answer the third question, it is proper to observe, that it is a well established rule of law, that an act of a legislative body containing several separate and distinct sections, clauses, or enactments, is not wholly void, because one section, clause, or enactment, may be unconstitutional, and therefore void. It is void so far as it may be unconstitutional, and no farther. When any enactment, which is determined to be unconstitutional is so connected with other enactments, that they cannot without it operate, as the constitution requires, that they should; such other enactments thereby become unconstitutional and inoperative. To such extent as an apportionment is determined not to be made as the constitution requires, that it should be; the State may be considered as not divided into districts for the choice of Senators. And the duty required of the Legislature making it to such extent as unperformed. If such must be the legal result in the present instance, it may be said, that the existing Legislature cannot perform that duty, because the constitution required it of the last and does not now permit it to be done oftener than once in ten years. When however the constitution requires an act to be done at a specified time, and there is an omission to perform it at the time; there is the discretion, if so it may be called, before alluded to, arising out of the moral necessity of the case, and limited to it and by it as before stated. And to deny the right and to withhold the power of performing it at the earliest possible

time afterward, would be to annihilate the constitution and dissolve the government. Such a variety of unforeseen circumstances are presented to disarrange the prescribed course for conducting public business, and to prevent an exact and perfect p rformance at the very time specified; that it may be doubted, whether any written form of government could be sustained without some conservative principle to uphold it and prevent its dissolution. Upon what principle a discretion of this description, and one still more enlarged, is claimed as existing not only without any constitutional provision but against one, for the purpose of preventing a failure to apportion the Senate, thereby preserving the government; and at the same time its existence denied in a nearly similar case, and for a similar purpose, is not readily perceived. There is however another principle adapted to such a crisis. The law accommodates itself to these necessities in human affairs, and provides for those like the present by the maxim; that time is not of the essence of the compact, except where it becomes so by the nature of it, or is made so by it. And the time prescribed in the constitution for the performance of any legislative duty cannot be considered as within the first clause of this exception; for it cannot be considered as of the very nature of a compact of government, that a legislative act should be performed on any particular day, or month, or year. And it cannot be considered as coming within the second clause of the exception, for time cannot be considered as made essential by it, unless it appears to have been the intention of the parties to it, that it should be so, and that it should cease to bind them and operate as formerly after a failure to perform at the time named. And it is not credible, when no indication of it is found in the constitution, that the people intended that their frame of government should cease to be

operative for any practical or beneficial purpose, because an important act required of the Legislature was not performed at the very time specified.

It may be said, that the duty was confided to the particular persons composing that Legislature. It is believed however, that the duty was an official one confided to the members, whoever they might be, composing the legislative branches of the government in their official character; and not to them personally in their personal character. The answer to the third question is therefore in the affirmative with the restrictions before stated.

These are some of the reasons for the course, which the undersigned with regret feels obliged to pursue; and they are with diffidence and respect submitted to the consideration of the Senate.

ETHER SHEPLEY.

I, the undersigned, one of the Justices of the Supreme Judicial Court to whom was sent an order of the Senate passed February 4, 1842, requesting their opinion in writing upon certain questions in said order contained, in answer thereto respectfully submit the following:

To the first question—I perceive no fact embraced in this question excepting that portions of the counties of York, Cumberland and Franklin were added to the county of Oxford and a district thereby formed for the choice of Senators. I do not consider that we can rest our answer upon any other fact. It is not our duty nor is it competent for us to determine whether that district conformed as near as may be to county lines and was apportioned according to the number of

inhabitants, unless the facts given in the order require it of us. To say what could have been done is not for us—it would be taking to ourselves the power to do what was entrusted by the constitution to the Legislature. We cannot test their doings by experiments of our own, and consequently in that manner we cannot say they exceeded their power. I think it is not to be inferred that that district did not "conform as near as may be to county lines" because it is formed by the addition of portions of the counties of York, Cumberland and Franklin to the county of Oxford.

To the second question—The only fact on which this question is predicated that can induce us to doubt the competency of the Legislature to form the present Senatorial Districts in the counties of Kennebec and Waldo, is—that a "smaller part" of the former county could be taken and annexed to the latter than by the act of 1841 was taken from Waldo and annexed to Kennebec. It does not appear in any other respect that a nearer conformity to the constitutional requirement could take place.

I do not feel certain whether this comparative term was intended to refer to number of inhabitants or to extent of territory, to "smaller part" of population or to less number of acres. Ceding a part of a State or country and invasion of a country by a foreign power refer generally to territory—but in comparing one town, county or State with another in magnitude number of inhabitants is the basis of the comparison generally—and when we speak of the *larger* and *smaller* counties in this State even in the formation of Senatorial Districts, we often, if not generally refer also to population. I am the more induced to think the latter, the meaning of the Senate, inasmuch as the census, taken officially, furnished the certain means of knowing the comparative size of counties and towns in this respect and I am not aware that any offi-

cial survey of the territory was ever taken or directed. Moreover, we do find by the census that there was a smaller fraction in Kennebec after providing for three Senators than there was in Waldo after providing for two. I propose to examine the question on each hypothesis of the meaning of the term and I am not aware that a different result will follow.

The constitution provides that "districts shall conform as near as may be to county lines and be apportioned according to the number of inhabitants."

Equal representation in the Senate so far as practicable was undoubtedly in my opinion the primary object to be secured. Although entire conformity to county lines is not required yet a variation therefrom is to be as little as possible consistently with other things not to be put out of consideration. In *language*, the last clause of the quotation forbids any deviation from an exact apportionment according to the number of inhabitants—but when we consider that it was not contemplated that towns and plantations were to be divided—because their inhabitants are to express their wishes through a municipal organization which could only be done in meetings of entire towns and plantations, we may well conclude that the language was not intended to be inflexible. Any other construction would, in most instances, at least, arrest all legislative action on this subject; for, perhaps, no towns could be found even without regard to county lines, containing the precise population requisite for the proper number of Senators. These three things, then, are to be kept in view in the formation of districts—lines of towns and plantations—apportionment according to the number of inhabitants—and conformity "to county lines as near as may be." If either of these must yield, and I think one or the

other must to some extent—the second cannot be made to yield entirely to the last, and necessity requires that both should yield to the first.

What is the construction to be given to the term "shall conform as near as may be to county lines?" Not that county lines are necessarily the lines of districts, which would be taking away all effect to be given to the words "as near as may be"—but that the variation should be as little as possible and still preserve substantially the other two elements. The very use of the qualification implies the propriety of a departure from county lines. When such a departure takes place to secure a more equal representation, is not this conformity such as shall not only embrace the least territory, but be done by lines as direct, as comprehensive and as parallel to the county lines as possible, giving the district a compact and symmetrical character, instead of one that is misshapen and inconvenient? Districts are of a more temporary nature than counties. The latter are intended to be more permanent, and are supposed to be formed for the accommodation and convenience of the people. Adherence as far as possible to the lines of them would be a check upon a disposition to form the districts for party or other sinister purposes. If these views are correct, we think it does not follow, because a "smaller part" of Kennebec could have been annexed to Waldo, *estimated by number of inhabitants*, that therefore towns could have been found in Kennebec containing the requisite population which would be separated from Kennebec and annexed to Waldo by a line more nearly conforming to the county line of Waldo than the one adopted, either in its direction, extent or amount of territory embraced.

I cannot consider that the words "smaller part," have legitimately such a meaning. As we are not informed how

such supposed line is to be drawn, what towns and how much territory it is to embrace, we have not the means in this view of the question of saying that it was not competent for the legislature of 1841 to form the counties of Kennebec and Waldo into two districts as was done.

Are we drawn to any different result, if we suppose "smaller part" has relation to territory instead of population, the apportionment being equally proportioned to the number of inhabitants? If my definition of the term "shall conform as near as may be to county lines," is not erroneous, it does not follow that the part which could have been taken from Kennebec and annexed to Waldo, would conform more nearly to county lines because it would be smaller in this sense; and we have no criterion given by which to judge of its conformity thereto, excepting that it would be a "smaller part." Several towns containing the requisite number of inhabitants, extending from the dividing line of the two counties into the centre, or almost to the extreme part of the county of Kennebec, of the width of only one town, and embraced within lines irregular and of great extent, but containing a smaller amount of territory than that taken from Waldo and annexed to Kennebec, may be imagined to be the "smaller part" contemplated in the order—and I cannot think the lines embracing such towns would conform more nearly to the county line. Although I do not mean to suppose such a case was referred to by the Senate, still there is no fact in the question which precludes its existence, and before I can say that a solemn act of the Legislature is a violation of the constitution, I must be free from reasonable doubt, and the facts given or by which we are bound, must necessarily bring me to such a conclusion.

It was the duty of the Legislature of 1841 to form dis-

tricts for the choice of Senators. They were to look faithfully to the great object of equal representation; they were to make the districts as nearly conformable to county lines as possible and preserve this object, and not divide towns and plantations. These three circumstances could not be overlooked. They could not all exist in perfect exactness. The Legislature could by no means disregard either of these restrictions. They were bound by them according to their true meaning taken together, as imperiously as by any other constitutional requirements; but these could only be an approximation to entire perfection; and as by the term "as near as may be," implies a license to a deviation which could not be limited to any precise rules, I think it obvious that a discretion was intended from the necessity of the case, to be lodged with the Legislature. That discretion must be limited to such necessity. They are bound to exercise that discretion in a sound and proper manner, and in obedience to their high obligations, carefully keeping in view all constitutional restrictions and requirements.

But who are to judge of the existence and extent of that necessity, and where is the superior power that shall direct how they shall exercise that discretion?

In making senatorial districts a variety of formations may be presented. There may be so many changes of the lines, that it would be difficult to detect that form and those towns which shall certainly be the nearest in all respects to the literal constitutional demand. And when districts are formed, I am not prepared to assert that the act is unconstitutional, even if it should be made to appear that another form and another list of towns would have approached more nearly to a *strict* compliance.

I cannot believe an act of this importance is to have so

uncertain existence, formed necessarily in the exercise of some discretion; that it is to be annulled when it shall be found that greater ingenuity, skill, and industry, perhaps aided by facts not known or required to be known by the Legislature, have been able to go deeper into the problem, and discover a line approximating nearer to perfection. I cannot think one supercedes the other because more exact, when both necessarily fail of being *strictly* correct.

In all former apportionments, in this State, it is believed that generally counties have been declared the districts for the choice of Senators, and some have had a large excess and others a large deficiency over and under the exact ratio. But there has been a general acquiesence in the propriety of such districts, and yet the great object of equal representation, which in its terms admits of no modification, has been made to yield undoubtedly to a conformity to county lines which is not by the constitution indispensable. There may be a departure from the requirements farther than is absolutely necessary, and still the spirit of the constitution is preserved inviolate. In another instance the course taken may be thought so palpably erratic that its restraints bave been thrown off; but where a discretion must be exercised by the Legislature, and there is no unerring rule which can be followed for their guidance, I do not conceive that there is any thing in the constitution which can invest us or any other department of the government, with the power to determine that matter of fact, and say that the discretion of this court or any other authority is to be substituted for that of the Legislature, in whose hands is deposited the trust. I see the existence of no power to revise their acts, performed in the exercise of a discretion, if there be the right to its exercise, any more than to revise the doings of each branch of

the Legislature in judging of the election of its members. In every such case there may be a gross abuse of power, but we look in vain for the authority for others than the people to sit in lawful judgment against them.

From the above considerations, aided by the reasons given by Chief Justice Whitman, I am of the opinion that the two first questions embraced in the order should be answered in the affirmative.

I concur in the views and results as expressed in his opinion in reference to the third, fourth, fifth, sixth, and seventh questions, contained in the order, and answer accordingly.

JOHN S. TENNEY.

ERRATUM.—The following should be inserted on the 3d page as the third question, and the remaining questions numbered accordingly.

3. If the answer to the foregoing questions be in the negative, has the present Legislature a constitutional power to make a new division of the State into districts for the choice of Senators or to make any alteration of the Senatorial Districts as then established?

STATE OF MAINE.

IN SENATE, February 25, 1842.

ORDERED, That 1,500 copies of the foregoing Questions and Opinions be printed for the use of the Legislature.

[Extract from the Journal.]

ATTEST: JERE HASKELL, *Secretary.*