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OF THE

STATE OF MAINE,

DURING ITS SESSIONS

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THIRTY-FIRST LEGISLATURE.

No. 28.] [HOUSE.

REPORT

Of the Minority of the Committee on Elections, on the contested election in the Representative District composed of Readfield, &c.

THE undersigned, a minority of the Committee on Elections, to whom were referred the credentials of Joshua Packard and Emery O. Bean, (both of Readfield, and claiming the right to seats in this House, as Representatives,) together with the opinion of the Justices of the Supreme Judicial Court, upon the questions submitted to them by order of the Legislature in relation to the same, have had that subject under consideration, and, dissenting from the report of majority of said committee, ask leave to make the following

REPORT.

By a resolve passed March 17, 1842, in compliance with the provisions of the constitution, as amended by a resolve passed that day, the towns of Readfield and Fayette were classed as one representative district. By an act of the legislature, passed August 12, 1850, the town of Kennebec was incorporated from territory composed of portions of the city of Augusta, and the towns of Hal-

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lowell, Litchfield, Readfield and Winthrop, and in said act provision was made that said town of Kennebec should be added to the representative district, composed of the towns of Readfield and Fayette, until the next general apportionment for the choice of representatives to the legislature, which said district it was therein provided should thereafter consist of the towns of Readfield, Fayette and Kennebec, and be entitled to one representative.

At the annual election in 1850, the inhabitants of said towns of Readfield, Fayette and Kennebec, qualified to vote for representatives to the legislature, gave in their votes in their respective towns for representatives to the legislature, as follows:

Town of Readfield, for Emery O. Bean,	118	
Town of Readfield, for Joshua Packard,		93
Town of Fayette, for Emery O. Bean,	81	
Town of Fayette, for Joshua Packard,		67
Town of Kennebec, for Emery O. Bean,	8	
Town of Kennebec, for Joshua Packard,		136
	207	296

Total, Emery O. Bean, 207—Joshua Packard, 296.

In Readfield and Fayette alone, Emery O. Bean received one hundred and ninety-nine votes, and Joshua Packard received one hundred and sixty votes.

In the district as arranged in 1850, composed of Readfield, Fayette and Kennebec, Joshua Packard received two hundred and ninety-six votes, and Emery O. Bean two hundred and seven votes.

If the votes of Kennebec be not counted, Emery O. Bean has a plurality. But if the votes of Kennebec be counted, Joshua Packard has the plurality.

If the legislature could constitutionally, in 1850, incorporate the town of Kennebec, and annex the same to the representative district composed of Readfield and Fayette, the votes of Kennebec should be counted to ascertain the person elected from that district. If the legislature had no such right, then surely, the votes of Kennebec should not be counted.

"It is premised," say the majority of the committee, "that the right of the legislature of 1850, to incorporate the town of Kennebec from parts of several other towns, is universally conceded. The right to annex," &c., "is alone controverted." Who concedes it? Has the question ever been started and discussed in this State? Has any one ever said that the legislature either have or have not that right, prior to the report of the majority of this committee? The government of this State is a government of a constitution and laws. The constitution prescribes the rights, powers, duties and obligations appertaining to all the various departments of government. Neither department of the government can exercise any powers or authority not expressly or by necessary implication in that instrument conferred upon it. All the rights, powers and authority not therein, either expressly or impliedly yielded up to some one of the departments of government by the people, are by them retained. Whatever the people, in forming their constitution have *in terms expressly* enjoined, authorized or forbidden, we are bound to believe they have enjoined, authorized or forbidden understandingly. That it is a matter they have thought of intelligently and seriously, have decreed it understandingly, and determined it shall stand against every thing except their own solemn decree and injunction, contained in the same instrument. When different portions of the constitution are found under certain circumstances to clash with each other, we will endeavor so to construe the discordant provisions as to most nearly harmonize the whole. The authority, rights, power, duties and obligations conferred by implication in that instrument upon any department of government, may have been thought of by the people when they formed the solemn instrument by which they organized and established the government under which they determined to live, and they may not. At any rate, they were not considered of sufficient consequence to give them a place in the constitution. They were not thought worthy of an express decree or enactment. They can only be considered as incidents binding upon or assumable by that department of the government to which they appertain, whenever and in

such a manner that they do not clash with any express provision contained in that instrument. Whenever either the implications or the express enactments or provisions of the constitution must yield, no one, the undersigned apprehend, will hesitate to say that the express provisions will override and control the implications. Is there any express provision in the constitution authorizing the legislature or any other department of the government, to incorporate towns or alter or change their limits, or alter or change their powers, duties or rights, or municipal government, at any time or in any manner? It is conceived that no such positive provision can be found in the constitution. That the legislature have that right no one doubts; but they have it by implication. And they have it limited to that use only which shall not be oppressive and for the public good, and not in contravention but promotion of the express provisions of the constitution. The inevitable conclusion is, that whenever the legislature cannot incorporate a new town, change the limits or municipal government of an old one, without a violation of the express provisions of the constitution, it can do *neither* constitutionally.

Article 4, part 1, section 2, of the constitution, provides for a general apportionment of representatives among the several counties, to be made not oftener than once in five nor at longer intervals than once in ten years. Article 4, part 1, section 3, provides for an apportionment of representatives among the several towns and plantations. In that section, no provision is made as to the rule the legislature shall adopt in so apportioning said representatives. It is not therein said that the legislature shall apportion each county on its own basis, taking the number assigned to it by the provisions of the 2d section, rather than adopt a general basis and ratio for the whole State, and by that apportion the representatives among the several towns and plantations in the whole State. The two methods, as is well known, lead to very different results. Nor is there in that section anything directory as to the time when any apportionment shall be made of representatives among the several towns and plantations. The whole is to be ascertained by the

rules of construction which judicial experience and common sense have pointed out as safe, and the acquiescence of a long series of years has established as law. All parts of the statute or constitution are to be taken together and so construed as to make it, if possible, a uniform and consistent whole. The last paragraph in the 3d section, is as follows:—"The right of representation, so established, shall not be altered until the next general apportionment." Apply, then, the common rule of construction, and what is the result? The juxtaposition of the 2d and 3d sections, their relating to the same subject, the 3d section being only a more minute subdivision of it than the 2d section, shows that the people intended both sections to constitute one simple entire enunciation of a single entire proposition, limited, defined and explained, in its whole, by the limitation as to time contained in the second section. To make things doubly sure, they have said the same thing in words in the last paragraph of the 3d section, above quoted. The only common sense view of that paragraph is, that the framers of the constitution, after the two sections were drawn out, supposed it possible that some doubt might be raised, as to the extent of the limitation as to time contained in the second section, and added that paragraph to make everything certain. But it is said, that the last paragraph in section 3d, applies *only to that portion of the section* which provides for giving certain towns, not entitled to entire separate representation, separate representation their proportion of the time, and that it leaves it in the power of the legislature to alter other districts whenever it may choose. Admit that to be the true application of the paragraph, and it is conceived that it gives the legislature no such power. But admit even for argument sake, that such a construction would give the legislature the right contended for, the alterations in that case, must be so made as that the districts so altered, shall be conformable to the provisions of the constitution, and they must be made in the manner provided for by the constitution. An enumeration of the whole people of the State must be first taken, and the number of inhabitants which the district should contain, be ascertained, and then the district be so

formed, as to contain as near as may be that number of inhabitants. The provision of the constitution authorizing the apportionment of representatives, requires that the number of inhabitants of the State shall be ascertained at the same time. The number of inhabitants of the State, has heretofore been ascertained, by adopting the census taken by the United States, and the apportionment of representatives has thus far been made immediately after the taking of that census. It is conceived, that at no other time can an apportionment of representatives, nor any alteration be made in any representative district, without first by State authority ascertaining the number of inhabitants in the State. But admit even that the alteration can be made, without a State enumeration, still the adding the town of Kennebec to the Readfield and Fayette district, must be unconstitutional. The legislature in 1842 constituted Readfield and Fayette a representative district, and authorized it to send one representative each year to the legislature, until the next general apportionment. In so doing, they observed the provisions of the constitution ; we are not to presume otherwise. They acted upon the whole State at once, and settled the matter with reference to the general whole, and adjusted all the districts in the State relatively right. The Readfield and Fayette district then contained the constitutional number of inhabitants to entitle it to one representative. By adding a part of Augusta, Hallowell, Litchfield and Winthrop, to that district, it makes the number of inhabitants larger than the constitution requires for one representative, so that the inhabitants are deprived of a portion of their constitutional rights and influence in this House. Again, admit the doctrine that the legislature have a right, at any time, to change any representative district, except those which are entitled to a representative only a portion of the time, and what is the result ? There are very few districts of the latter description. These are fixed ; but all the others may every year be changed, so as to shape the districts to suit the party then in power, and retain the party ascendancy when thought to be on the wane. Such is the inevitable tendency of that doctrine. The legislature cannot, under our constitution as

now worded, have the right to change a part of those districts entitled to entire representation, without having the right to change the whole. No one, I apprehend, will have the hardihood to advocate for a moment, the doctrine of the right of the legislature, at every session, to change all the districts in the State, entitled to an entire representation. Again, can any one for a moment believe that the people of Maine, in solemn convention, ever intended to tie up those towns and plantations which unfortunately contained not inhabitants sufficient to entitle them to an entire representation, and yet chose to be separately represented, and leave the others loose to change and vary as the legislature might choose?

Again, the last paragraph in said third section, is the only paragraph in that section which, in any way or manner, determines or appoints the time wherein the general apportionment of representatives among the several towns and plantations is to take place. Wherefore the undersigned believe that said last paragraph applies, not to the sentence immediately preceding, as is suggested by the majority report, but to the whole section.

It is said at the close of the opinion given by the justices of the supreme judicial court, in answer to questions directed to be propounded to them by order of the house of representatives on the 31st May, 1851, if a town incorporated from parts of several other towns, be not so incorporated "at the time of a general apportionment, provision may be made that such inhabitants as are entitled to vote for a representative shall remain united to their respective districts for the election of a representative until the next general apportionment." It is said this contravenes the 1st section of article 2d of the constitution, which expressly provides that every male citizen of the age of twenty-one years, not within the exceptions, residing in any town or plantation for three months preceding any election, shall have a right to vote for governor, senators and representatives, in the town or plantation in which he resides, and that by continuing the several portions of the several towns out of which the new town is formed, attached to their former representative districts, the citizens of those several tracts, in the teeth of

the constitution would be denied the right to vote in the town wherein they had resided three months, but allowed to vote in a town in which they do not reside. But it is not perceived how this consequence must necessarily follow from such an arrangement. There is no provision in the constitution prohibiting the legislature, upon incorporating a new town made up of portions of several old towns, from providing that the selectmen, at the several elections for representatives in such new towns, shall keep separate ballot boxes and separate check lists, until a different arrangement is made by a new general apportionment. Is it said such an arrangement would be inconvenient in the extreme? So it may be. But it is no excuse for a breach of an express provision of the constitution, that it is inconvenient to keep it. It is very inconvenient for a poor man, at sometimes, to get on without his neighbor's oxen, his cows, his horses, or his property generally; but is that any excuse for his taking them by force and without license? By no means. No more can a violation of the constitution be excused by the inconvenience of keeping it. If it is more inconvenient for the inhabitants living on the territory to be incorporated into a new town, to keep separate check lists and separate ballot boxes at the representative elections, than to remain as they are, let them remain as they are till the year of the general apportionment. No legislature would ever force upon them an act of incorporation against their consent. It is said that such an arrangement would be a violation of section 4th, part 1st, article 4th, which requires a member of the house of representatives to reside three months next preceding his election in the *town or district* which he represents. But it is not perceived how this can happen, for if the representative reside on a fraction of a new town, which fraction still remains attached to its original district, he still resides in the district he represents.

It is said it would also violate that provision of the 3d section, 1st part, artitcle 4th, which provides that in "forming representative districts towns shall not be divided. But this is not dividing towns in the forming of districts, but it is subdividing or re-arranging the civil and political precincts and corporations into which districts

are or may be divided at their formation;—which re-arrangement or subdivision after the formation of representative districts, no single passage in the constitution prohibiting can be found.

The same principle applies in the case of towns as obtains in the case of incorporating new counties, or changing the boundaries of old ones. It is no unusual occurrence that in the incorporation of new counties, representative districts are divided, a portion of them remaining in the old, and another portion being included in the corporate limits of the new counties. Who ever thought of re-arranging representative districts thus divided, prior to the next general apportionment? Yet it is conceived that the constitution as strongly prohibits the original formation of a representative district composed of territory situate in two distinct counties, as it prohibits the dividing towns in the original formation of such districts, and that it is quite as necessary to readjust representative districts when divided by the incorporation of new or the readjustment of old counties, as when the same are divided by the incorporation of new or the readjustment of old towns.

Hence, if the power of the legislature to readjust representative districts de denied, it is clear that no inhabitant must necessarily be disfranchised if the territory upon which he lives is set off from one town and annexed to another in a different district, in the interval between two general apportionments.

The only other matter contained in the report of the majority of this committee to which the undersigned deem it necessary to advert, is the third proposition assumed by them, viz:—"3d, that the power of the legislature to readjust representative districts between the periods of general apportionment so as to make such districts conform to subsequent alterations of town limits belongs to it as a right necessarily incident to the general and admitted power of the legislature to divide and incorporate towns."

This is a stringing together of incidental powers in a manner fitted to shock even the most latitudinarian constructionist. The power to incorporate and divide towns is no where given in the constitution, which is the only instrument from which the legislature

can derive any express authority to act. All its powers not therein established are implied or incidental. That power is therefore only incidental or implied in the legislature. And if upon this power as incidental, thereto hangs the power to readjust representative districts between the periods of general apportionments which overrides and controls the express provisions of the constitution, then we have in the government of this State the anomalous example of a power incidental to a power itself *only* incidental to a branch of the government established by the constitution overriding and controlling the express provisions of the constitution. An anomaly, it is believed, never before either heard or thought of by even the most visionary politician. The very stating of the proposition in this land of laws and constitutions is enough to show its absurdity and refute it.

Such being the views entertained by the undersigned, they respectfully submit them to the consideration of this house, trusing that this house will concur in them as correct and sound. By the principles and reasoning herein laid down, they find that Emery O. Bean, at the September election in 1850, in the district of Readfield and Fayette as formed in 1842, received the largest number of votes thrown for any one candidate, at said election in said district. We would, therefore, ask leave to recommend the passage of the accompanying resolve.

JOHN H. WEBSTER,
HENRY CARTER,
JOHN HOMANS.

STATE OF MAINE.

RESOLVE in favor of Emery O. Bean.

Resolved, That Emery O. Bean is legally and constitutionally elected and entitled to a seat in this house as representative from the district composed of the towns of Readfield and Fayette.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, March 15, 1852.

ORDERED, That 350 copies of the foregoing Report, be printed for the use of the House.

EDMUND W. FLAGG, *Clerk.*