

# MAINE STATE LEGISLATURE

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DOCUMENTS

PRINTED BY ORDER OF

THE LEGISLATURE

OF THE

STATE OF MAINE,

DURING THE

EXTRA SESSION OF 1853, AND SESSION OF 1854.



Augusta:

WILLIAM T. JOHNSON, PRINTER TO THE STATE.

1854.

# OPINIONS

OF THE

JUSTICES OF THE SUPREME COURT,

IN OBEDIENCE TO AN ORDER OF THE HOUSE OF REPRESENTATIVES,

PASSED JANUARY 18, 1854,

WITH THE

STATEMENT OF FACTS AND QUESTIONS.

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AUGUSTA:  
WILLIAM H. SIMPSON, PRINTER.

1854.

STATE OF MAINE.

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HOUSE OF REPRESENTATIVES, }  
JAN. 27, 1854. }

ORDERED, That 2,500 copies of the Opinions of the Supreme Court, together with the Statement of Facts and Questions, be printed for the use of the Legislature.

JOHN J. PERRY, CLERK.

## STATE OF MAINE.

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HOUSE OF REPRESENTATIVES, }  
January 17, 1854. }

ORDERED, That the following statement of facts be submitted to the Justices of the Supreme Judicial Court, and they be required to give their opinions on the questions appended thereto—viz :—

On the first Wednesday of January instant, the members elect of the House of Representatives assembled in the Representatives' Hall, and, a quorum being present, the members were qualified, and the House was duly organized by the choice of a Speaker and Clerk, of which organization the Governor and Council and Senate were, by order, to be informed by message, according to the usual custom.

From an examination by the Governor and Council of the lists of votes returned to the office of the Secretary of State, but thirteen Senators appeared to be elected, leaving vacancies in the second, third, fourth, fifth, sixth, eleventh, and thirteenth districts—all which appeared by a report accepted by the Governor and Council.

The thirteen Senators thus appearing to be elected assembled in the Senate Chamber on the first Wednesday of January current, and proceeded to organize by the election of a President and Secretary pro tempore, after being duly qualified, of which the House of Representatives was notified by message.

The Secretary of State then laid upon the table of the Senate the lists of votes for Senators, which were referred to a committee for examination.

That committee on a subsequent day reported the election of the thirteen members who had been declared elected and summoned to appear by the Governor and Council, and further

reported that vacancies existed in the second and fifth senatorial districts, and also the names of the constitutional candidates to fill those vacancies—which report was accepted. But no report was then, or has since been, made, or vote passed, with reference to the other districts.

After the acceptance of the above named report, a message was sent to the House of Representatives, informing the House that vacancies existed in the second and fifth senatorial districts, giving the names of the constitutional candidates to fill the same, and proposing a convention to fill said vacancies—with which proposition the House refused to concur.

It has been the uniform usage in this State, since the formation of the government, to determine and declare all vacancies, existing in the Senate on the day appointed for the meeting of the Legislature in each year, before the members of the House of Representatives, and such Senators as shall have been elected, proceed to elect, by joint ballot, the number of Senators required, and then to appoint a convention for that purpose.

In the year 1847, but eleven Senators appeared to be elected. The Senators elect met on the day appointed, elected a President and Secretary pro tempore, and the votes for Senators were laid on the table, and committed. The committee subsequently reported who were elected, and also the whole number of vacancies existing in the Senate, and the names of the constitutional candidates to fill said vacancies. This report was accepted, and a message was subsequently sent to the House, informing that body that vacancies existed as reported by the committee, and stating the names of the constitutional candidates to fill the same, and proposing a convention for the purpose of filling the same; with which proposition the House concurred, and the same were filled accordingly.

In the year 1851, but fifteen Senators appeared to be elected, and the same course was taken.

#### QUESTIONS.

1st. Whether, if a majority of the whole number of Senators required by law are elected, and the Senate duly organized, the provisions of section 5, article 4, part 2d, of the constitution require, or contemplate, that the Senate shall determine who are

elected to be Senators in all the Senatorial districts, before the members of the House of Representatives, and such Senators as shall have been elected, proceed to elect, by joint ballot, the number of Senators required? If the constitution does so require, does it necessarily result that all existing vacancies should be ascertained and declared before proceeding to such election?

2d. Whether the provisions of that section contemplate, or authorize, a convention, in the first instance, for the purpose of filling a part only of the vacancies existing in the Senate on the first Wednesday of January?

3d. Whether a Senator, elected by "the members of the House of Representatives, and such Senators as shall have been elected," to fill a vacancy existing on the first Wednesday of January, is entitled to vote in a convention held for the purpose of filling other vacancies in the Senate, existing on said first Wednesday of January?

4th. When less than a majority of the whole number of Senators required by law appear, by the lists returned to the office of the Secretary of State, to be elected, can such Senators, less than a majority, constitute "the Senate," in the sense in which that term is used in the constitution? Can such Senators, less than a majority, exercise the powers, or perform all, or any part of, the duties devolved upon "the Senate" by section 5, article 4, part 2d, of the constitution? If so, what part? Can such Senators, less than a majority, decide on the legality of election returns as shown by the lists returned to the Secretary's office, receive evidence of election other than is contained in such lists, and determine elections upon such evidence? Can they declare vacancies in the Senate, and determine who are constitutional candidates? If so, upon what evidence?

5th. When the House of Representatives has been duly organized, and a minority only of the whole number of Senators required by law appear to be elected, can the members of the House and a minority of such Senators as appear to be elected legally form a convention for filling vacancies in the Senate, all of such Senators being duly notified, but a majority refusing to act?

*Ordered,* That a copy hereof, signed by the Speaker, and

## QUESTIONS.

attested by the Clerk of this House, be communicated forthwith, and by the most expeditious mode, to each of the Justices of the Supreme Judicial Court, and an answer to the foregoing questions requested at the earliest possible moment.

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HOUSE OF REPRESENTATIVES, January 18, 1854.

Read and passed.

NOAH SMITH, Jr., Speaker.

Attest: JOHN J. PERRY, Clerk.



# OPINIONS.

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PORTLAND, January 26, 1854.

HON. NOAH SMITH, JR.

*Speaker of the House of Representatives :*

DEAR SIR: Enclosed herewith I have the honor to transmit opinions of Justices of the Supreme Judicial Court, in obedience to an order of the House passed on January 18, 1854.

Most respectfully,

ETHER SHEPLEY.

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The undersigned, Justices of the Supreme Judicial Court, present the following observations and answers to communicate their opinions and some of the reasons therefor, in obedience to an order of the House of Representatives, passed on January 18, 1854 :

The constitution provides that "the legislative power shall be vested in two distinct branches, a House of Representatives and a Senate, each to have a negative on the other."

In several sections the words "each house" are used to designate the respective branches. In others the word "Senate" is used to designate the branch so denominated. No term is found to be used in the constitution, other than Senate, or House, or House of Representatives, to describe or designate those branches when less than a quorum of members is present. When so composed, the Senate is designated by the word "House" in article four, part third, and sections three, four, five and six : and is authorized to exercise certain of the powers conferred upon the Senate by those sections. By the

third section it may, when so composed, adjourn, from day to day, compel the attendance of absent members, provide the manner in which their attendance shall be procured, and prescribe the penalties under which they shall be required to attend.

By the fourth section it may, when so composed, punish its members for disorderly behavior. If such were not the true construction, it could not protect itself, or be in a condition to perform duties required of it when so composed.

By the fifth section it is required, when so composed, as well as at other times, to keep a journal of its proceedings.

By the sixth section it may, when so composed, punish a person not a member, for obstructing its proceedings, or assaulting or abusing any of its members for anything said or done in the Senate. This construction is also necessary for its protection, and to enable it to perform duties enjoined upon it when so composed. Other powers named in those sections it may not be authorized to exercise when so composed.

The Governor and Council are required to "issue a summons to such persons as shall appear to be elected by a majority of the votes in each district, to attend that day (the day appointed by the constitution) and take their seats." They must take their seats as Senators, and can act only in their official capacity, and in that capacity they must act as a branch of the Legislature for certain purposes. It is only as representing that branch that they can be authorized to organize in any manner as a Senate, or to notify the other branches of the government of their organization or presence in the chamber appointed for them, or can receive from the Governor and Council the copies of the "lists," or can adjourn or keep a journal. These are acts essentially necessary to be performed, whether a majority of the Senators be or be not elected and present. Unless this be the true construction, this branch of the Legislature may, under certain circumstances, fail to be organized according to its provisions.

The words "Senate" and "House" appear to be used in

the constitution to designate that branch, whether composed of a greater or less number of Senators, when it is in a condition to keep a journal or record of its proceedings, or to perform acts required of it or authorized by the provisions of the constitution.

In the year 1830, when a quorum of both branches of the Legislature were present, the Justices of this Court gave their opinions that no other body than the Senate could, under the constitution, designate the constitutional candidates to supply deficiencies of Senators occasioned by omissions to elect by the qualified voters. When less than a quorum of Senators is present, no express provision is found in the constitution to authorize such a designation. It is not perceived how any such power can be implied without depriving the Senate of the power of being the judge of the election and qualification of its own members.

By the fifth section of article four and part second, it is provided, "The Senate shall on said first Wednesday of January annually determine who are elected by a majority of votes to be Senators in each district."

If the word "Senate" or "House" be used in this section and in all other parts of the constitution, as it appears to be, to designate that branch, whether composed of a quorum or a less number, the power to perform that duty is expressly conferred upon a Senate so composed, unless its power to do it is restricted by some other constitutional provision. No such provision is found, unless it be in the phrase "and a majority shall constitute a quorum to do business." That phrase or provision should not receive such a construction, without the most urgent necessity for it, as would under any conceivable circumstances prevent the organization of the Legislature according to the provisions of the constitution, and leave the State without a constitutional government, to be governed by one existing, and organized only as a necessity; or such construction as would prevent the performance by the Senate of duties expressly required of it, and which cannot be performed by any other body or branch of the government, according to the provisions of the constitution.

If the only acts to be performed by a Senate composed of less than a majority of Senators, were considered to be fully enumerated in the latter clause of the third section of article four and part third, a Senate so composed would be deprived of the power to protect itself, to keep a journal of its proceedings, and of the power to punish its own members or others for obstructing its proceedings.

It is not unusual to find language used when a particular subject is under consideration, which would be too comprehensive to exhibit the idea intended, if not limited by the subject occupying the thoughts. The subject then under consideration appears to have been the "Legislative power." It does not treat of their organization. That had been provided for before. It treats of their power to do business after they have been duly organized. That language may, therefore, upon familiar principles of interpretation, be regarded as applicable only to such business as the Houses could respectively perform after they had become organized, and as not applicable to proceedings required to procure an organization. When considered as thus restricted, and yet as having its intended and appropriate meaning, there is found no limitation of the authority of the Senate, whether composed of a majority of the Senators or not, to determine under any circumstances, and for all purposes, who are not elected by a majority of the qualified voters to be Senators, and are eligible or qualified to be Senators.

If a Senate so composed could not constitutionally so determine, Senators legally elected by qualified voters, and having the qualifications required for Senators, might be excluded from the Senate, and deprived of the rights secured to them by the constitution. If all vacancies apparent from the proceedings of the Governor and Council were to be filled by joint ballot of the members of the House and such Senators as shall have been elected, those Senators so elected could not be deprived of their seats by a subsequent decision of the Senate alone. Those who are assembled to make such elections by joint ballot, must of necessity and by a power fairly implied, determine who have been so elected; and when they

have so determined, the vacancies are filled according to the provisions of the constitution, and the constitutional right to be Senators is secured to them. If the Senate alone could determine that such Senators were not legally elected, and not entitled to their seats, they could annul the proceedings of the body or convention authorized to elect them and to decide that they had been legally elected. If this could be done once, it might be continued to be done, and the final organization of the Senate be prevented for an indefinite time. This would neither comport with the language or intention of the constitution. The elections of Senators, respecting which the Senate is made the exclusive judge, are such as are made by the qualified electors. The election of Senators by a joint ballot must be made from the "lists" of person voted for, and made by the selectmen and clerks of the several corporations composing the district, or from copies of them. Persons whose names are not upon such lists cannot be elected. The Senate, while determining who are constitutional candidates, must also be confined to such lists, and so must the Governor and Council, while ascertaining who appear to have been elected. This does not make such lists conclusive evidence who are truly elected Senators, or who have the qualifications required for Senators. No person, by such lists alone, can, therefore, be considered as conclusively entitled to be a Senator, or as certainly not entitled to be one, by an election by qualified voters.

By this construction, and by this only, upon the facts stated, can the Senate be constitutionally organized without considering some other branch of the government to possess powers not conferred upon it by the constitution, and without depriving the Senate of power conferred upon it.

The construction of the constitution presented by this paper will, under any perceivable circumstances, enable the State to have a constitutional government without conferring powers upon any branch of the government not found to be vested in it by the constitution, and without depriving any branch of any power conferred upon it, and will prevent any occasion for a resort to a government of necessity. No other construction has been presented leading to such results.

By the third section of article fourth and part third, each house "may compel the attendance of absent members in such manner and under such penalties as each house may provide." This power is expressly conferred upon each house when composed of a less number than a quorum to do business.— The word "members" in that section appears to have been used in the former clause respecting elections as designating Senators who have not, as well as those who have, been qualified and been present as members of the Senate; and no sufficient reason is perceived why the word should not have the same meaning in the latter clause of the same section. The section would then authorize a Senate composed of less than a quorum to compel the attendance of those whom it adjudged to be members, whether they had ever been present as such or not. If this be not the true construction of the latter clause of that section, the Senate, after a majority of Senators have been constitutionally elected, may fail to be organized and there may be no constitutional government in the State.

If the Governor and Council should ascertain that a majority of the whole number of Senators had been elected, and should summon them to appear at the appointed time and place, and a sufficient number to prevent a quorum should deny that they had been constitutionally elected, or should for factious purposes wilfully refuse to attend, thereby to prevent a quorum, those who should attend, being less in number than could form a quorum, would then constitute a House or Senate expressly authorized to compel the attendance of the absent members.

This construction of a similar provision in the constitution of the United States appears to have been sanctioned by rules adopted by the Senate of the United States, as stated in Jefferson's Manual, on pages 24 and 25 of the edition published at Concord in the year 1823. The rule is said to be "in case a less number than a quorum shall convene, they are hereby authorized to send" "for any or all absent members." "And this rule shall apply as well to the first convention of the Senate at the legal time of meeting, as to each day of the session." This rule as applicable "to the first convention of the Senate," could not have been legally estab-

lished unless the Senate, when composed of a less number of Senators than would form a quorum had authority, by the constitution, to compel the attendance of absent members. The Senate of this State when so composed, to be enabled to compel the attendance of absent members, must determine who were elected. It would be expressly authorized to act as a Senate to determine the manner in which their attendance should be procured, and the penalties to be incurred by their refusal to attend. It is only by its acts as a Senate, that a number less than a quorum composing it could for such purpose issue any legal precept, which must be issued in the name and by the authority of the Senate, or could cause the legislature to be organized, or could keep a journal of its proceedings. The Governor and Council are only authorized to ascertain who appear to be elected Senators, and have no power to determine who are elected. That power is entrusted to the Senate alone, and it must determine whether those appearing from the "lists" to have been elected, were elected and had the qualifications required for Senators. Here then is an instance in which an express power is given to a Senate composed of less than a quorum, and it may by possibility be of a single Senator, to determine who are elected Senators and to compel their attendance. If any number of Senators, however small, may be designated as a Senate, and be organized and act, and may by an express power determine who are elected for one purpose, there can be no sufficient reason to conclude that it was not the intention of the framers of the constitution, that a Senate composed in the same manner should act for all other constitutional purposes to determine who are not elected, for the purpose of procuring an organization of the Senate in another and different mode.

The constitution requires the Senate to determine who are elected Senators by a majority of the qualified voters in each district. It contemplates it as an act to be performed on the day appointed for the first meeting of the members of the Legislature after they have been elected. There is a provision in the fourth section of the ninth article, that in case the elections required shall not be completed on that day, the same may be adjourned from day to day until completed.

Circumstances may prevent the Senate from being able to determine in one day, and for several days, who are constitutionally elected, having the required qualifications.

It is not made the duty of the members of the House, to meet the Senators who have been elected to elect by joint ballot other Senators before the Senate has determined who are not elected in all the districts. It is not however considered that Senators could not be legally elected by the agreement of both branches, before the Senate had determined who were not elected in all the districts; while it is considered that each house may rightfully refuse to proceed to an election by a joint ballot until after a determination has been made by the Senate respecting the non-election of Senators in all the districts.

It is such Senators and such only "as shall have been elected," who are authorized to vote in joint ballot with the members of the House to elect other Senators. The words "shall have been elected," have reference to such Senators as shall have been elected by the qualified voters. If it should be admitted that these words may properly describe those Senators who have in any mode been elected before the elections by joint ballot are made, still the constitution contemplating all such elections should be made at one time, and on the day appointed for the first meeting of the Legislature, it would not have been expected or intended that other electors should be entitled to vote, if circumstances should require an adjournment to another day, after a part of the elections had been made by joint ballot.

When a determination has been made, who are not elected Senators, and who are the constitutional candidates, and other persons have been duly elected Senators by joint ballot of the members of the two Houses, there can be no revision of that determination without annulling the elections made in joint ballot, which is entirely inadmissible. Such determination is therefore necessarily a final and conclusive one.

By a construction which will authorise a number less than a quorum, to determine who are not elected Senators, and what vacancies exist, and who are the constitutional candidates, there may be a compliance with every requirement of the constitu-



tion, and a constitutional government at all times secured; without such a construction there can be no such compliance, and no such security. And without such a construction occasions may frequently occur and circumstances be presented which will prevent the organization of a constitutional government without the exercise of power not conferred upon it by some branch of the government, or without a resort to the organization of a government from necessity. There is little cause for alarm, that such powers may by possibility be exercised by one Senator. Such an occurrence can be expected but rarely, if ever. Powers more extensive and important may, under the constitution of the United States, and under those of several of the States, be exercised by one person. Experience has proved that the most important and delicate trusts are as faithfully performed by one, and by a few persons, as by a large number of persons.

To the first question, the answer is : That section does require the Senate to determine who are elected Senators in a district before other persons can, by joint ballot, be elected Senators for such district.

It does contemplate that the Senate shall determine who are elected Senators in all the districts, and "that all existing vacancies should be ascertained and declared before proceeding to such election." And each House may rightfully refuse to meet the other to make such elections by joint ballot until all existing vacancies have been so ascertained and declared; while this mode of proceeding is not regarded as so essential, that Senators could not by the agreement of both Houses be legally elected before all existing vacancies had been so ascertained and declared.

To the second question the answer is : The provisions of that section do not contemplate a meeting of the members of the two Houses to make such elections by joint ballot "for the purpose of filling a part only of the vacancies existing in the Senate on the first Wednesday of January." Those provisions are not regarded as forbidding such a course, when adopted by the agreement of both Houses.

To the third question the answer is : A Senator so elected is

not entitled to vote in a meeting or convention of the members of the two Houses "held for the purpose of filling vacancies in the Senate existing on the first Wednesday of January."

To the fourth question the answer is in the affirmative to the first interrogation put in that question; and to the second interrogation put in that question, it is in the affirmative. To the third interrogation it is: All the powers required by the constitution to be exercised by the Senate to procure an organization of that house. To the fourth interrogation the answer is in the affirmative, and to the fifth also. To the sixth the answer is: The Senate being authorized to decide upon the election of its own members, must have the right to determine upon what evidence it will do it.

To the fifth question the answer is in the negative.

All of which is most respectfully submitted to the House of Representatives, by

ETHER SHEPLEY,  
JOHN S. TENNEY,  
SAMUEL WELLS,  
JOSEPH HOWARD,  
J. W. HATHAWAY,  
JOHN APPLETON.

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My concurrence extends to the answers to questions 1, 2, 3, 5, and to the first interrogatory of question 4, and to such part of the opinion as gives less than a majority full power to do all necessary acts to complete the Senatorial board, but not to the full extent of powers indicated in the opinion.

JOHN APPLETON.

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Not having been able to meet and confer with my associates in the consideration and adoption of the foregoing opinion, I have examined the same, and concur in the answers to the *fourth* and *fifth* questions, but not in all the reasons stated for coming to such conclusions. I do not concur in the answer to the *third* question, nor to so much of the answer to the *first* question as states that the members of the House may rightfully refuse to meet those Senators who have been elected to elect others by joint ballot. To the *second* question, I answer that the provisions of the section referred to, do *authorize* a convention in the first instance for the purpose of filling a part only of the vacancies existing in the Senate on the first Wednesday in January.

RICHARD D. RICE.