MAINE STATE LEGISLATURE

The following document is provided by the

LAW AND LEGISLATIVE DIGITAL LIBRARY

at the Maine State Law and Legislative Reference Library

http://legislature.maine.gov/lawlib

Reproduced from scanned originals with text recognition applied

(searchable text may contain some errors and/or omissions)

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

JUSTICES RICE AND APPLETON,

OF THE

SUPREME JUDICIAL COURT,

ON QUESTIONS PROPOUNDED BY THE HOUSE OF REPRESENTATIVES,
JANUARY 18, 1854.

Augusta:
WM. T. JOHNSON, PRINTER TO THE STATE.

1854.

STATE OF MAINE.

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.

First. 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?

Second. 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?

Third. 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?

Fourth. 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 deter-

mine who are constitutional candidates? If so, upon what evidence?

Fifth. 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 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.

HOUSE OF REPRESENTATIVES, January 18, 1854.

Read and passed.

NOAH SMITH, JR., *Speaker.*

Attest: JOHN J. PERRY, *Clerk.*

JUDGE RICE'S OPINION.

To Hon. LUTHER S. MOORE,

President of the Senate of the State of Maine:

The undersigned, in response to the order of the senate, dated January 30, 1854, presents some of the considerations for the answers by him returned to the questions propounded by the house of representatives, January 18, 1854, to the justices of the supreme judicial court, and the reasons for his non-concurrence with a majority of the court in all the answers by them returned.

The powers of our government, conferred by the constitution, are, primarily, divided into three distinct departments—the *Legislative, Executive,* and *Judicial.* These departments are severally entrusted with certain specified powers which they are required to exercise, each for itself, entirely independent of the other. The powers confided to these departments, are in many instances, subdivided and distributed among different *branches,* and upon these branches are conferred powers, to be exercised, sometimes in concurrence with each other, and in other cases, by independent action; thus constituting a government, at once free, and so regulated by checks and balances, arising out of the distribution of its powers, as to prevent precipitate and inconsiderate action, in times, when by reason of excitement, single bodies, acting under a common impulse, may be in danger of running into error.

Though our government is thus complex in its form, with important powers confided to the independent action of its dif-

ferent departments, and the different branches of those departments, yet there are in it no conflicting powers, but the legitimate action of the whole will be found to be entirely harmonious. Thus, when a power is conferred upon a department, or branch, to be by it exercised independently, the exercise of that power is, either by distinct provision, or by necessary implication, withheld from all others.

In the construction of provisions of the constitution, which may appear ambiguous, regard should be had to the general scope and object of the whole instrument, and when it is doubtful to which department or branch, the exercise of an independent power belongs, it should be assigned to that, by which, from its character, it can be most appropriately exercised.

These considerations being kept in view when cases of apparent conflict arise, will always afford a safe rule of interpretation.

The legislative power of the government is vested in two distinct branches, a house of representatives and a senate, each having a negative upon the other. Some of the powers conferred on these branches, are common to both, and are to be exercised in concurrence. Others are confided to the separate action of each, and are to be exercised by each, with absolute independence of the other.

Prominent among the latter, stands the provision, in the third section of part third, article fourth, which declares that "each house shall be the judge of the elections and qualifications of its own members." This provision, so far as the senate is concerned, may be deemed rather declaratory of existing rights, than as conferring new powers. Section five, of article four, part second, confers upon the senate the power to "determine who are elected to be senators, by a majority of the votes, in each district," and as a necessary correlative, who are not elected, or rather, in what districts, if any, vacancies exist.

In the same class of independent powers, is found the power of the senate to try all impeachments, and of each house to choose its own officers; to compel the attendance of absent members; to determine the rules of its proceedings; to punish

its members for disorderly behavior; to keep a journal of its proceedings; to punish persons not members for disrespectful or disorderly behavior in its presence; or for obstructing any of its proceedings; or for threatening, assaulting, or abusing any of its members for any thing said, done, or doing in either house.

These powers can only be exercised by each house, according to its discretion, and neither has the right to exercise them for the other, or in any way to dictate the manner in which they shall be exercised by the other. All of them may be exercised when a majority of members, or a quorum for doing business is in attendance, and many of them when less than a quorum is present.

The result of the possession of these independent powers is to authorize each branch, or house, to perfect its own organization. To the house, this power, in its fullest extent, has never been denied, or questioned. It is a power, incident to, and inherent in all independent deliberative bodies, founded upon the most universally recognized principles of parliamentary law.

Article fourth, part second, section fourth, provides, that the governor shall issue a summons to such persons as appear to be elected, to attend and take their seats.

Like the credentials of the members of the house, the "summons" of the governor is prima facie evidence of election, and authorizes those who "appear to be elected," in the first instance, to take their seats as members of the senate.

These members, when assembled, the fifth section recognizes as "the senate," and confers upon it the power, and imposes the duty, to determine who are elected by a majority of the votes, to be senators in each district. This section also contemplates that vacancies may be found to exist, and makes no distinction in the power of the senate, dependent upon the number of those vacancies, but in all cases where vacancies exist, the duty of the senate and the mode of its procedure in effecting its organization are the same.

It has been supposed that the power to act, does not exist,

on the part of the senate, unless a majority of its members appear to be elected, and shall have been summoned by the governor. This opinion is based upon that clause of section third, part third of article fourth, which declares that "a majority shall constitute a quorum for the transaction of business."

In construing particular provisions of the constitution, care should always be taken to observe the connection in which they occur. Part second, of article fourth, treats of the election and qualification of senators, and the *organization* of the senate. Part third, of the same article, treats of the "legislative power" after both branches have been duly organized and are in a condition to act as a legislature; and the clause referred to, as limiting the power of the two houses when less than a majority is present, is manifestly intended to apply to the transaction of that kind of business incident to legislation. Any other construction would be liable to obstruct and wholly prevent the organization of the senate, even when a majority appeared to have been elected, and had been summoned by the governor. An examination of the returns, or other evidence, might disclose errors which would compel the senate to determine, that only a part of those who had been summoned, less than a majority, had actually been elected. Under the construction contended for, that body would thereby be rendered powerless, unable to proceed, and that branch of the legislature be practically dissolved. The same result would follow when less than a majority were "summoned" by the governor.

The constitution is not justly chargeable with any such self destructive principles. It contemplates a government continuous and permanent in its character, and as the various instruments by which it is carried forward decay, or pass away, it will be found to contain vital energies and recuperative principles sufficient, under all circumstances, to reproduce others, of a similar character, in endless succession.

The senate has the power, when organized, and when a quorum is not present, to compel the attendance of absent members. There is no good reason perceived, why the same power

should not exist before it has perfected its organization. Indeed it may be necessary that it should then possess that power, to enable it to effect this object. That power has been supposed to authorize a senate composed of less than a quorum to compel the attendance of those whom it may determine to be elected, whether they have been duly qualified to act as members or not. This would seem to extend that power beyond its legitimate limits. The "members" whose attendance may be rightfully coerced, are those who have not only been elected *to be* senators, but who have actually *become* such, by taking upon themselves the prescribed oaths of office, by which they are qualified to *act* as members of the senate.

Should it be said that if this power, to its fullest extent, be denied to minorities, factious men may be enabled to prevent the organization of that branch of the legislature, and thus all constitutional government be destroyed, the answer is that the same result may be effected, by resignation, revolution, or usurpation. But the constitution, relying upon the intelligence and patriotism of our people, contemplates no such contingencies. When the time shall arrive in which citizens cannot be found, who are willing to assume the official trusts required by the constitution, and when they shall, with one consent, abjure all official station, then may we pronounce the experiment of maintaining a free government to be "a failure." It is believed no such unfortunate contingency is now apparent.

If these positions are correct, then it follows that those who "appear to be elected" and who are summoned by the governor, whether more or less than a majority, constitute "the senate" within the meaning of the constitution, with powers sufficient to perform all those acts which are necessary to perfect the organization of that body as a branch of the legislature. These powers are derived from distinct constitutional provisions,—they also would arise by necessary implication from the fact that the senate is an independent, co-ordinate branch of the government, if the constitution were silent upon the subject.

The fifth section provides that "the senate shall, on the said

first Wednesday of January annually, determine who are elected by a majority of votes to be senators in each district," and further provides the manner in which existing vacancies shall be supplied. This provision undoubtedly contemplates that the "determination" shall be made on the said first Wednesday of January annually. But the contingency is also contemplated by the constitution, in which all the vacancies may not be filled, on that day; as section four of article nine provides, that "in case the elections, required by this constitution on the first Wednesday of January annually, by the two houses of the legislature, shall not be completed, on that day, the same may be adjourned from day to day until completed."

There is no provision in the constitution, wherein the order of time in which the senate shall determine who are elected in each district is prescribed, nor is there any express provision requiring the senate to determine who are elected, in *all* the districts, before vacancies shall be supplied, by election, in *any*. If any such necessity exists, it must arise by implication, and not from any positve command in the constitution. The language used is suggestive of separate action. The senate is to determine who are elected in *each* district.

Practically, the construction that all must be acted upon at the same time, might lead to very serious inconvenience. Thirteen members only, of the present senate have been summoned by the governor, leaving, apparently, eighteen vacancies. Suppose of these eighteen apparent vacancies, seventeen are indisputably such, and one only is contested. This contested seat may involve an inquiry into the legality of the proceedings, and the qualification of voters, in every town and plantation in the contested district. To determine the question of election or non-election in such a case, must, necessarily, consume much time. Now must the seventeen undisputed cases be suspended, for an indefinite period of time, and the state deprived of the services of a majority of the members of the senate, and that branch of the legislature paralyzed, because the right to one seat is contested—and that, too, when the facts involved in the

contested case in no wise affect the others? This case is put hypothetically for purposes of illustration. A construction leading to such results should not be adopted, unless dictated by the plain requirements of the constitution, or from the most stringent necessity.

But it has been suggested, that if such a contingency should arise, the two branches might, to obviate such results, proceed with the election in the undisputed cases, by agreement. To hold that the organization of one branch of the legislature, in any case, depends upon the voluntary agreement of the other, would be to destroy its independence, and subordinate it to the will if not to the caprice of the other. Such is not the intention of the constitution. If the senate is imperatively required by the constitution to determine who are elected, or who are not elected, in all the districts, before any vacancies can be supplied, it is not perceived on what principles a part only of those vacancies can be filled by the two houses without a violation of that instrument. I know of no authority on the part of the two houses to waive the positive requirements of the constitution, by agreement, or otherwise. Any such agreement would be simply void, and no legal rights could be acquired under it.

In 1851, fifteen senators were summoned by the governor. Those senators appeared, were qualified, and took their seats, May 14, 1851. A committee was appointed, to whom the returns of votes for senators were referred. On a subsequent day that committee reported that the fifteen members (those summoned) were elected "*as appears by the returns*," and further reported sixteen existing vacancies. This report was accepted by the senate, and the vacancies were filled by a convention of the members of the two houses. Honorable Jeremiah Fowler, of the eighth senatorial district, was one of the fifteen declared to be elected as above, but his right to a seat was contested. The subject was referred to a committee of the senate. A protracted examination was had, both before

the committee and in the senate. The legislature adjourned from June to January following, and it was not until the 24th of February, 1852, that the senate finally *determined* by a vote of fourteen to twelve, that Mr. Fowler was constitutionally elected. [*Senate Journal*, 1851–2.]

In 1843, the governor summoned twenty-two senators, who appeared and were qualified on the fourth day of January of that year. The senatorial votes were referred, on that day, to a committee. On the sixth day of the same month, the committee reported, *in part*, excluding the fourth (Kennebec) district, declaring twenty-two members, including one from Penobscot, who had not been summoned by the governor, to be elected. The committee also reported six vacancies, which were filled, by election in convention of the members of the two houses, on the afternoon of the same day. In the fourth senatorial district, one senator only (Mr. Smiley) had been summoned by the governor. The election of all the members in that district was contested. On the eleventh day of that month, the committee made an additional report, accompanied by a resolution, in which it was determined that John Hubbard, Jacob Main and David Stanley were constitutionally elected, thus excluding Mr. Smiley. This report was accepted by the senate by a unanimous vote. [*Senate Journal*, 1843.] In view of this practical construction which has been put upon the constitution, by the senate, and acquiesced in by the house, at times when they could not be supposed to have been influenced, in this particular, by any improper motive, and in view of the fact that the senate has the power distinctly conferred upon it to determine who are elected, and necessarily when vacancies exist, and from the considerations already referred to, it would seem to follow as a legitimate consequence, that it is authorized to determine the order of time in which it will act, as matter of discretion. But in this, as in all other matters of discretion, it must act upon its official responsibility.

The same result would also follow from the familiar prin-

ciple that when a general power is conferred, it carries with it, as an element, discretion as to its exercise, unless the manner in which it is to be exercised is specifically provided.

If, then, the senate may, in its discretion, determine the order of time in which it will report existing vacancies, a corresponding obligation would seem to rest upon the house to concur in filling those vacancies—otherwise that conflict would arise in the exercise of powers, independent in their character, which the constitution does not contemplate.

The fifth section, before referred to, provides, "in case the full number of senators to be elected from each district, shall not have been so elected, the members of the house of representatives and such senators as shall have been elected, shall, from the highest numbers of the persons, voted for, on said lists, equal to twice the number of senators deficient, in every district, if there be so many voted for, elect by joint ballot the number of senators required."

It has been suggested that the language, "such senators as shall have been elected," is applicable to such only as have been elected by the voters at the polls. This construction is supposed to be favored by the peculiar collocation of the words in that section. But when the concluding clause of the same section is considered: "and in this manner all vacancies in the senate shall be supplied, as soon as may be, after such vacancies happen;" and when it is further considered that no inequality of right or power exists among the members of the senate—that a senator elected by a convention of the members of the two houses, is, when duly qualified, clothed by the constitution with all the powers, and invested with all the rights which pertain to the office of senator, it is not perceived on what principle he can be excluded from a participation in filling any vacancies which may exist, without reference to the time or manner in which they may have occurred.

While this construction does no violence to the language of the constitution, it preserves the just rights, and essential equality, of all the members of the senate. This is also the

practical construction, which it is understood has been put upon a similar provision in the constitution of Massachusetts, by the legislature of that state now in session.

These considerations, so far as they do not lead to concurrence with opinions already expressed by my learned associates, are advanced with great diffidence; but they have brought my mind to the following conclusions, as indicated in a note appended to the opinion of a majority of the court, addressed to the house of representatives:

First. That if a majority of the whole number of senators required by law are elected, and the senate duly organized, the provisions of section 5th, article 4th, part 2d, of the constitution contemplate, but do not require, that the senate shall determine who are elected to be senators in all the senatorial districts before the members of the house and such senators as shall have been elected, proceed to elect, by joint ballot, the number of senators required. The rule is not imperative.

Second. That the provisions of that section 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.

Third. That 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 in January, is entitled, when duly qualified to act as a senator, to vote in a convention, held for the purpose of filling other vacancies in the senate, existing, but which had not been filled, on said first Wednesday in January.

And I fully concur with the majority of the court in their answers to the fourth and fifth questions.

All of which is repectfully submitted.

RICHARD D. RICE.

Augusta, January 31, 1854.

JUDGE APPLETON'S OPINION.

BANGOR, February 11, 1854.

SIR:—I received, yesterday, a communication from a committee of the honorable senate, informing me of the request of that body, that I should furnish them with my opinion in full, upon the questions recently submitted to the justices of the supreme judicial court, by the house of representatives. In compliance with their expressed wish, I have the honor to present the following considerations:

The constitution of Maine in article 4, part 2, section 5, provides for the filling of all vacancies existing in the senate on the first Wednesday of January, and for those which may subsequently arise.

This section provides for two things to be done, and for the order of time in which they shall be done. What is last to be done, is consequential upon the performance of that which is first to be done, and it cannot be accomplished, till that which precedes it in the order of time shall have been determined.

The provision as to what is first to be done is in these words:

"The senate *shall*, on the said first Wednesday of January, annually, *determine* who are elected by a majority of votes to be senators *in each district*." The natural and obviously occurring meaning is that *all* elections should be then determined, for if this be not done, they will not have been determined in *each* district, which this branch of the section requires—the object being at the same time to ascertain all

vacancies in each district. The meaning of the word *each* is not satisfied and the idea indicated is not answered by a determination in less than in *each* district.

The section then proceeds as follows:

"And *in case* the *full* number of senators from *each* district shall not have been so elected, the members of the house of representatives and *such* senators, as shall have been elected, *shall*, from the *highest* numbers of persons voted for, on said lists, equal to *twice* the number of senators deficient, in *every* district, if there be so many voted for, elect by joint ballot the *number of senators required*." The subsequent action required in this clause, involves and presupposes the ascertainment of certain facts. It is only "*in case* the *full* number of senators to be elected from *each* district shall not have been *so* elected" that any subsequent action is to be had. It is not in case it is determined that part of the "senators to be elected from *each* district" shall not have been so elected, that the constitution requires any thing to be done. If "the members of the house of representatives and such senators as shall have been elected" should go into convention with a partial determination of vacancies, by and under what portion of this section is such action commanded or required? It can only be by a construction by which *the full number* may be held to mean any portion of the full number—and by which the vacancies in *each district* may be held to mean the vacancies in part of the districts.

The election is to be made "from *twice* the number deficient in *every* district," and "the number of senators required" is to be elected. Twice "the number of senators deficient in every district" is not twice the number deficient in part of the districts, nor is "the number of senators required" a part or parts of such number. If *all* vacancies are not ascertained, if "twice the number of senators deficient in *every* district" be not determined—it will be impossible to do what this section requires—that is, supply "the deficiency in *every* district," for it will not have been ascertained—nor to elect "the number of senators required," for in such event "the number of senators

deficient" will not have been determined. It is only "*in case the full* number of senators to be elected from *each* district shall not have been *so* elected" and "twice the number of senators deficient in *every* district" shall have been determined "from the highest numbers of the persons voted for, on said lists," that the constitution commands that there *shall* be an election and that the duty to obey arises as a constitutional obligation.

The electing body is described as composed of "the members of the house of representatives and *such senators as shall have been elected.*" Such senators as shall have been elected? When? To what time does this refer? Most manifestly to the first Wednesday of January. It can refer to no other period of time. It follows then that one elected in this mode is not and could not have been referred to as constituting one of the electors, for he would not have been a senator at the time referred to, and his senatorial rights would have arisen from the very election contemplated in this section.

The last clause provides that "in this manner all vacancies in the senate shall be supplied *as soon as may be* after such vacancies happen." The preceding portion of this section refers to vacancies existing *on* the first Wednesday of January. This relates to vacancies happening after this time, as by death, resignation or in any other mode, and provides that the manner in which they shall be filled shall be the same, as in case of vacancies existing at the time of the first meeting of the senate.

Other and different provisions might have been made, and they might or might not have been more convenient. The true inquiry is as to the meaning of the words used. In the construction here presented, the plain and natural meaning of the words used, has been regarded. From the report accompanying the questions proposed by the house of representatives, it appears that "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 proceeding to elect by joint ballot, the number of senators required. An

uniform usage of so long continuance, while not conclusive, may yet justly be regarded as no slight confirmation of the correctness of the preceding construction of this section of the constitution.

These views afford an answer to the first three questions of the house.

Either house when first assembled, and consisting of less than a quorum, is obviously not clothed with the powers and cannot exercise the functions of one having a constitutional quorum. But because a quorum has not been elected, or being elected may not be present, neither the government nor the legislative branches of the government, cease to exist. Every legislative body is necessarily subject to those rules of procedure and is possessed of those powers without which it would be impossible to accomplish the purposes of its existence. The power to punish for contempts, except when committed by their own members, is not given to the house of representatives of the United States, yet it has been judicially determined to exist by the highest tribunal of the Union—as a power necessarily derived from implication. The first congress under the constitution was held at New York, on March 4, 1789, but a quorum not being present, the house met and continued its existence by successive adjournments till the first of April, when a quorum having taken their seats, the election of its officers took place. A quorum of the senate was not had till April 6, when a message was sent to the house, informing them of that fact, and that a president had been elected for the sole purpose of opening and counting votes. During this time a journal was kept—the bodies thus assembled were respectively termed the house or senate—and their legislative existence had relation back to the day of their first meeting. That a legislative body, when less than a quorum, may organize so far as may be necessary to call that body into existence—that it may continue its existence by successive adjournments—that it may keep a journal and record its proceedings—that it has the power of self-protection incident to all legislative bodies—that when a quorum is had,

it then becomes possessed of full legislative power—that its legislative existence relates back to the date of its temporary organization—and that during all this time it is entitled to its appropriate designation as senate or house as the case may be, cannot be doubted. Thus much is necessary by the law of self-preservation inherent in all legislative bodies, and is believed to have been sanctioned by universal usage.

Whether the senate has or has not further power, is to be ascertained by recurring to article 4, part 2, which relates to the senate and its organization, and provides for the development of its organic number in case of vacancies arising from failure to elect.

Before examining the sections of the constitution bearing on the remaining questions presented, certain considerations resulting from the views already presented, obviously occur. The theory of the constitution contemplates a full senate—and the first duty imposed on the senate relates to the filling of all vacancies existing on the day of its meeting, without regard to their number, whether many or few. The full number of legislative bodies is ordinarily obtained from without as by popular elections. The mode by which the senate is filled is peculiar and anomalous, the initiatory steps to obtain a full senatorial board arising from within its own body and its full number is the result of an election by an electoral body, of which its own members constitute a part. Each house is the judge of the election of its members, and no power is given to either house to judge of the election of the members of the other. The ascertainment of its condition—the preliminary steps necessary to the development of its constitutional number, are given to the senate as a part of its organizing power and for the purposes of its organization.

The question then arises, whether those powers can be exercised by less than a quorum.

By article 4, part 2, section 3, the lists of votes for senators, duly attested, are required "to be delivered into the secretary's office thirty days at least before the first Wednesday of Janu-

ary." The next section provides, that the governor and council, after examining "the returned copies of such lists," shall "issue a summons to *such persons as shall appear to be elected* by a majority of votes in each district, to attend that day and take their seats."

The persons who appear to the governor and council from the lists to be elected as senators, and who attend and "take their seats," as such, without regard to their number, are, immediately on taking their seats, and before any addition can be made to their number, denominated "the senate" by the fifth section. The senators, thus summoned, whether few or many, are "to take their seats"—that is, assume the functions of senators. They each form a part of the senate. They are senators, in fact, and of right. The section then declares that the senate—that is, that those thus summoned, "shall determine who are elected," &c. No negative words restricting the power of those thus summoned are to be found. The object to be obtained, is a full senatorial board by the action of those who *appear to be elected*, and have been summoned and taken their seats. The powers of each branch are separate and distinct. The power of determining vacancies is given in express terms to the senate—that is, to those thus assembled. It is not given to any other branch of the government, and resort should not be had elsewhere, unless under the pressure of the most urgent necessity. No such necessity exists.

The conclusion is, that the constitution contemplates a full senate—that it recognizes less than a quorum as a senate, and as clothed with limited powers—that they may determine vacancies—give the house the necessary information of their existence, and co-operate with them in completing the senatorial board. These powers are necessary to the complete organization of the body. In other respects, the senate, when having less than a quorum, and in the process of completing its number, is equally with the house subject to the general infirmity of power incident alike to each branch of the legislature when in that condition.

Article 4, part 3, relates to "legislative power," and embraces both the power of general, as well as of that particular legislation, which is to be exercised by each house in providing penalties by which to compel the attendance of absent members, or to determine its rules of proceedings, &c.

The third section of article 4, part 3, provides that "each house shall be the judge of the *elections* and *qualifications* of its own members, and that a majority shall constitute a quorum to do business." This section presupposes that each house has had a quorum, and has been organized, and in possession of full "legislative power." In terms, it applies to each house, and to those who have become members in any mode provided for in the constitution. It recognizes the power of adjudication of the election of members, and of their qualifications,—a power essential and important to every legislative body as a part of the legislative duty of each house. After a full house, or its constitutional equivalent, a quorum, has been had, and the house has been organized, can less than a quorum judge of the election and qualification of its members? If so, they can do more than adjourn, and they must have this power only because it is no part of the business of the house. If they cannot do this, after the house or senate has had a quorum and been organized, it is difficult to perceive how a body in the process of procuring an organization, can with less than a quorum conclusively bind by its determinations the same body, when its full number shall have been obtained; in other words, that a minority of the senate can have greater powers while adopting the necessary proceedings to procure its full number, than the same number would have after the senatorial board shall have been completed. If less than a quorum, while organizing, have this power, to determine conclusively, and forever bind the senate when complete in its numbers, they must have it equally whether such condition is the result of absence or failure to elect.

It is obvious, that if to "determine who are elected," is to have the same force and effect as the phrase "shall be the judge of the *election and qualification* of its own members"—if the

powers of a senate, when its numbers are complete, are to be forever concluded by the action of less than a quorum, while in the process of completing its numbers,—in the present case the power of the senate to judge will in advance have been taken from it, even before by the constitution the right to exercise it will have existed. If this power exists in less than a quorum, while completing its numbers, it must exist equally whether arising from absence or failure to elect; and a senate, when complete in its numbers and organization, will enter upon the discharge of its duties shorn of its power to judge of membership and qualifications.

Such a meaning, if possible, must be given to each part of the constitution as will give the fullest scope to the general intention of the instrument, and as will least conflict with its particular provisions. The senate has power to "determine." "Each house shall be the *judge* of the elections and qualifications of its own members." It is a determination for the purpose of procuring a full senate, and is to be regarded as part of its organizing power. It is to be limited to the purpose in view. This limitation of meaning is further strengthened by the marked difference of phraseology in these two forms of expression. One not constitutionally a candidate, as an alien, may be elected and take his seat, and exercise the functions of a senator; and yet because not possessing the constitutional qualifications his seat may be vacated. The words used in these sections differ; the purposes for which they are used are different, and the force and effect to be given to them should be in conformity with the objects to be attained in each case. A determination for immediate action in the one case—a final and conclusive judgment in the other.

The senate in the first instance, is composed exclusively of those "*who appear to be elected.*" The completion of its full number is the first official duty imposed upon it by the constitution. The time and delay incident upon investigating cases of contested elections could hardly have been contemplated in reference to an act, which, if practicable, is required to be done

on the first day of its official existence. The determination would rather seem to be one to be based on existent materials—already in the archives of the state, and not upon the contradictory testimony of witnesses both as to elections and *qualifications* hereafter to be had—and after the delay incident to a protracted examination of complicated facts in an indefinite number of cases. The evidence upon which the senate would be authorized to decide, would seem to be the "returned copies of such lists," from which "the highest numbers of the persons voted for" is to be obtained.

These conclusions, for aught I can perceive, are inevitable, unless the "determination" of less than a quorum is to be held conclusive upon the senate when filled—a result, which would deprive it of one of its powers clearly granted, most essential and necessary and to which I am not prepared to assent.

I have the honor to be,
Very respectfully,
Your obedient servant,

JOHN APPLETON.

Hon. LUTHER S. MOORE,
President of the Senate of Maine:

STATE OF MAINE.

IN SENATE, February 3, 1854.

ORDERED, That Messrs. Clark of Lincoln, McCobb of Cumberland, and Prince of Oxford, be a committee to request of Hon. JOHN APPLETON, one of the Justices of the Supreme Judicial Court, his opinion in full upon the questions recently submitted to the Justices of said Court by the House; and that, as soon as said Opinion shall have been received by said committee, they be hereby authorized to cause fifteen hundred copies of the same, together with the Opinion of Hon. R. D. RICE, to be printed in the same volume, for the use of the Legislature.

Read and passed,

WILLIAM TRAFTON, *Secretary.*