

MAINE STATE LEGISLATURE

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DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE,

DURING ITS SESSION

A. D. 1856.

PART SECOND.

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THIRTY-FIFTH LEGISLATURE.

SENATE.

No. 9.

REPORT AND RESOLVE

IN RELATION TO

AMENDMENTS TO THE CONSTITUTION.

REPORT.

THE Committee to whom was referred the Message of the late Governor and the Report of the Council on the amendments of the Constitution relating to the Elective Franchise, together with the returns of votes from the several cities, towns and plantations in said amendments, have had the same under consideration, and ask leave to

REPORT :

Opinions, which, with more or less authority, have been expressed outside of the Legislature, and, of which, to pretend ignorance, would be affectation, made it the first duty of the Committee to inquire: What are the powers and duties of the Legislature in the matter, and, of consequence, what are the duties of the Committee appointed by the Legislature?

This part of the subject can most readily be considered in answering three questions :

First—What duties and powers, in regard to amending the Constitution, are, by it, entrusted to the Legislature ?

Second—How far can these duties and powers be delegated by the Legislature ?

Third—What duties and powers were delegated to the Governor and Council by the Legislature of 1855.

The Constitution, being the fundamental law of the State, must necessarily be complete in itself, and no source of authoritative construction can be sought elsewhere. The interpretation put upon it by the highest judicial power of the State, is the only authority that can justify us in acting upon any other than our own honest convictions of its true meaning. Any acts of a former Legislature in regard to it, though worthy of respectful consideration, as showing what was the opinion of men who, like us, were obliged to act upon their understanding of its meaning, would not excuse us from a reconsideration of these opinions, or justify us in following their precedents, unless they agree with our own convictions.

Taking the constitution as at once the thing to be interpreted—and the only guide to its own interpretation—what seems to be our duty ?

The 4th section of article 10th is in these words :

“ The Legislature, whenever two-thirds of both Houses shall deem it necessary, may propose amendments to this constitution ; and, when any amendment shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at their next annual meeting in the month of September, to give in their votes on the question, whether such amendment shall be made ; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this constitution.”

In this section is contained all there is in the constitution, as to what is to be done to produce a change in it, and who are to do the things necessary to produce the change. The first impression produced by this language is, that the constitution recognizes but two parties as having anything to do in making amendments, viz: The two Houses of the Legislature and the inhabitants of the State. Unlike legislative acts, no approval by the Governor is necessary.

The things to be done are ;

First—The Legislature, by a two-thirds vote of both Houses, shall propose an amendment.

Second—The Legislature shall pass a resolution and send it to the selectmen of the towns and the assessors of the plantations empowering and directing them to notify the inhabitants, to vote on the question, whether such amendment shall be made.

Third—It must *appear* that a majority of the inhabitants voting on the question are in favor of the amendment.

Until these three things have been done, the constitution remains unchanged. On the first two of these, no question exists. No one doubts, that two-thirds of each House must propose the amendments; that they must pass the proper resolution and send it to the towns and plantations and that a majority of the inhabitants voting on the question must show, by their votes, that they are in favor of the amendment. The only remaining question is how and when it is to become known, or appear, that the majority of those voting on the question are in favor of the amendment. The how, all will admit to be by counting the legal votes given for and against the amendment, and thereby ascertaining, on which side of the question is the majority of votes. In this power, of counting the votes, is necessarily included the power and duty of rejecting illegal votes, and is in so far a judicial power. The votes being counted, and the majority ascertained, some promulgation seems necessary in order that this fact, which completes the amendment, and makes it a part of the constitution, may appear.

Taking any other ground, would lead us to the absurd conclusion that the constitution might be amended and the fundamental law of the State changed and yet nobody know it. Inasmuch, therefore, as only two parties are recognized as active in the change of the constitution, it seems to us, that to one, or both of these parties belongs the duty of ascertaining and making known the fact, that the amendment proposed has received the approval of a majority of the voters; and as, by the nature of the case, this cannot be done by the voters themselves, it follows that it must be done by the other party, viz: the two houses of the Legislature. Arriving at this conclusion, from the study of the constitution alone, we are confirmed in the opinion by a view of the practice of the Legislature in relation to all former amendments, except one, and, as that one was not approved by the people, it can hardly be considered a precedent.

Up to 1841, the uniform practice was to have the returns of votes from the several towns and plantations made to the Secretary of State, and by him laid before the Legislature, in the same way as votes for Governor are. The Legislature appointed a committee, who examined the returns, exercising the same discretion in rejecting or receiving them, that they did in relation to votes for Governor, reporting their doings to the Legislature, together with a resolve declaring the Constitution amended, and the Legislature accepted the report, and passed the resolve. In two instances no resolve was reported, but the report of the committee stated the vote, for and against the amendments, and that report accepted and entered on the journal, seems to have been considered a sufficient promulgation of the amendment.

Since 1841, the practice has been for the Legislature to direct the returns to be made to the Secretary of State's office, like the votes for Senators, and the Governor and Council to count the same, and make return thereof to the next Legislature. The report of the Governor and Council being made, the matter has invariably been referred to a committee of the Legislature,

who have examined the subject and, reporting thereon, have accompanied their report with a resolve, declaratory of the amendments, which the Legislature have passed. The passing such resolve, is strong evidence of the opinion of the Legislature, that on them devolved the duty of making it appear that a majority of the people voting were in favor of the amendments proposed. The Governor and Council seem to have taken the same view of the matter; and, although authorized in precisely the same words as the last Governor and Council, have never in their reports used language, from which it could be inferred that they considered their action final and conclusive.

The second question proposed is: How far can the powers and duties belonging to the Legislature be delegated? Most that requires to be said, in relation to this question, will be contained in our remarks in answer to the third question. As a general principle, it may be affirmed, that purely ministerial duties may be delegated, but acts of a legislative or judicial character cannot be so far delegated as to take from the delegating power the right to revise the doings of the delegate. The Legislature may and do appoint committees, to examine and report on various matters, but they must retain the power to adopt or reject the acts of such committees. They may and do appoint commissioners to revise the Statutes, but they cannot give to these commissioners the power to make laws. Other illustrations might be given, but the principle is familiar, and will not be disputed.

The third question proposed is: What powers and duties were delegated to the Governor and Council by the Legislature of 1855?

The language of the resolve, so far as it relates to this matter, is: The lists of votes shall be returned to the office of Secretary of State, "in the same manner as votes for Senators; and the Governor and Council shall count the same, and make return thereof to the next Legislature; and, if a majority of the votes are in favor of said amendments, the constitution shall be amended accordingly."

Under the power thus conferred, the Council, after stating the number of votes, which they found, for and against each question submitted, use this language: "And a majority of the votes being in favor of such amendments, it has been adopted as a part of the constitution." This report and declaration appears to have been made in Council Nov. 19, 1855, and the Governor is advised "to make return thereof to the next Legislature." The question is, was such a declaration authorized by the resolve under which they acted; and, having been so made, did the constitution become so amended at that date?

We are of opinion that no such power was delegated, and that no such result followed their act.

That the Legislature did not delegate to the Governor and Council final action in regard to the amendment, appears from the fact, that no power is given them to inquire whether the resolutions proposing the amendment had been "sent to the selectmen of the several towns and the assessors of the several plantations." There can be no question, that this sending is as necessary to an amendment of the constitution, as the voting, and in a case like the present, when so many towns neglected to make returns, this inquiry becomes of great importance. If, by the neglect of the proper officers, a large portion of the inhabitants were disfranchised on so important a subject, it might well be contended, that the amendments could not be declared adopted. But, even if it were to be presumed, that this requirement of the constitution had been complied with, it is sufficient to say, that the Governor and Council had not the power claimed, because it was never delegated to them by the Legislature. The power given to them is purely ministerial—"to count the votes and make return thereof to the Legislature." They have no greater power given them than has been at times given to the Secretary of State, who, in resolves prior to 1841, was authorized to make an abstract "showing the state of the vote." The well known practice in Legislative bodies, of appointing committees to receive, sort and count votes for any officer to be elected by the Legislature, is parallel. In

those cases the committee do not undertake to declare the result, but report the state of the vote, and the result is declared by the constituent body. If any farther argument were needed on this point, it is found in the resolves themselves under which the Governor and Council act; for a declaration by the Legislature that the amendments have been adopted is treated as a matter necessary and preliminary to an election under them. Such a declaration would be useless, if the Governor and Council were entrusted with final power in relation thereto.

Your Committee, therefore, came to the conclusion, that it is the duty of the Legislature to ascertain, whether the requirements of the constitution, necessary to an amendment of the constitution, have been complied with, and if so, by some public act to make it known; and that, in performance of this duty, the doings of the Governor and Council may be revised and any errors therein corrected; or the Legislature may proceed to an examination of the whole question, without reference to the doings of the Governor and Council; the responsibility resting solely upon the Legislature to ascertain and make known whether, under the constitution, the amendments are adopted.

In examining the subject the committee find, by the returns, that the question whether the first amendment proposed by the Legislature "shall be made," was not submitted to the voters, as a distinct proposition, and can only be supposed to be adopted as a necessary consequence of the other amendments.

That the question, whether the second amendment proposed "shall be made" was not submitted as one question, but as three questions, viz: Shall the Judges of Probate be elected? Shall the Registers of Probate be elected? Shall the Judges of Municipal and Police Courts be elected?

That the question whether the third amendment proposed "shall be made" was not voted on in the form proposed, but on the question: "Shall the Adjutant and Quartermaster General be elected?"

The fourth amendment was voted on under the question: Shall the Sheriffs be elected?

The fifth amendment proposed was voted on as two questions; one relating to the election of Land Agent, the other relating to the election of Attorney General.

It may well be doubted, whether, under the provisions of the constitution, an amendment, which has been agreed to, as a whole, by two-thirds of both Houses of the Legislature, can be adopted in part and rejected in part by the people; and, if, in the examination of the votes, such a result had been found, a grave question might have arisen, as to whether the amendment proposed could be considered adopted. But, inasmuch as it appears that there was a majority of votes in the affirmative, on each question submitted, the committee deem it their duty to report that the second, third, fourth and fifth amendments proposed, were substantially submitted to the people, and that it appears that a majority of the inhabitants voting on the question are in favor of such amendments; and that, when the offices made elective by such amendments are filled in the manner provided for in the resolves, the power of the Governor and Council to appoint to said offices, as it now exists, will cease.

In farther examination, the Committee find that 84 towns and plantations, which threw for Governor 11,953 votes, made no returns on the constitutional amendments, and 17 towns and plantations made no returns, either for Governor, or on the constitutional amendments. Several towns returned the blank with the remark on it, that it was not received in time to insert the proper articles in their warrant for town meeting.

In view of this large deficiency in returns from towns and plantations, the Committee deemed it proper to make some inquiry as to the means which had been used, to comply with the requirement of the constitution to "send the resolutions to the selectmen of the several towns and the assessors of the several plantations." We requested, therefore, the attendance of Alden Jackson, Esq., late Secretary of State, and inquired of him the means used, to provide the cities, towns and plantations, with the resolves and blanks directed by the resolves. He stated that the resolves and blanks for returns were enclosed

in packages, with the blanks for election returns, a package directed to each city, town and plantation in the State; that the packages for each county were put together, and, on the first of August last, sent to the sheriffs of the several counties, to be distributed to the cities, towns and plantations in accordance with chapter seven, section eleven, of the Revised Statutes, and that he had received letters from the sheriffs acknowledging the receipt of the several packages. Although this was not a strict compliance with the constitutional provision, that the resolves be sent to the *selectmen* of the several towns and the *assessors* of the several plantations, inasmuch as the statute authorizes the sheriff to deliver the packages to the *clerks* of the towns and plantations; we yet deemed it sufficient proof in the absence of any evidence to the contrary, or any remonstrances from the towns not voting, that the resolutions were sent in accordance with the Constitution, and that the absence of the returns was owing to some cause, which would not authorize us to declare that the amendments had not been properly submitted to the people.

In examining the returns of votes, the Committee have been governed, in receiving and rejecting returns, by the rules, which have usually been adopted by the Legislature in regard to the returns of votes for Governor, and they find the votes on the several questions submitted, to be as follows:

On the question of electing Judges of Probate, the number of ballots having the word "yes" thereon, is seventeen thousand five hundred and twenty-eight (17,528)—the number having the word "no" thereon is twelve thousand four hundred and twenty-seven (12,427).

On the question of electing Registers of Probate, the number having the word "yes" thereon is seventeen thousand and sixty-seven (17,067)—the number having the word "no" thereon is eleven thousand seven hundred and sixty-three (11,763).

On the question of electing judges of the municipal and police courts, the number having the word "yes" thereon is sixteen thousand eight hundred and seventy-one, (16,871); the

number having the word "no" thereon is eleven thousand eight hundred and three (11,803).

On the question of electing sheriffs, the number having the word "yes" thereon is seventeen thousand three hundred and eighty-two (17,382)—the number having the word "no" thereon is eleven thousand seven hundred and seventy-one (11,771).

On the question of electing adjutant and quartermaster general, the number having the word "yes" thereon is fifteen thousand seven hundred and nine (15,709)—the number having the word "no" thereon is eleven thousand three hundred and eighty-two (11,382).

On the question of electing the attorney general, the number having the word "yes" thereon is fifteen thousand nine hundred and fifty-one (15,951)—the number having the word "no" thereon is eleven thousand six hundred and twenty-four (11,624).

On the question of electing land agent, the number having the word "yes" thereon is sixteen thousand four hundred (16,400)—the number having the word "no" thereon is eleven thousand five hundred and twenty-four (11,524).

And the committee recommend the passage of the resolve, which is herewith submitted, "declaratory of amendments of the constitution."

Although the committee are aware that, so far as the rights of individuals are concerned, the effect of these amendments on the appointing and removing power of the Governor and Council, is a matter for Judicial decision, we deem it our duty, since it may have a bearing upon the acts of the Legislature, to say, that, in our opinion, inasmuch as the first election and the commencement of the term of office under these amendments, is fixed by the amendments, the power of the Governor, by and with the advice and consent of the Council, to remove and appoint to the offices made elective by these amendments, remains unchanged until said offices are filled by election.

All which is respectfully submitted,

AARON HAYDEN, *Chairman.*

STATE OF MAINE.

RESOLVE declaratory of amendments of the Constitution.

Whereas, it appears upon the examination of the
2 returns of votes in relation to certain amendments of
3 the constitution, provided for by resolves passed on
4 the seventeenth day of March, in the year of our
5 Lord one thousand eight hundred and fifty-five, and
6 of the report of the executive council thereon, that
7 the inhabitants of the several cities, towns and planta-
8 tions of this state, at the annual meeting in Septem-
9 ber last, gave in their votes on the following questions
10 submitted to them by virtue of said resolves, viz :

11 Shall the judges of probate, registers of probate,
12 judges of municipal and police courts, and sheriffs,
13 be elected by the people ?

14 Shall the land agent, attorney general, and adjutant
15 and quartermaster general, be chosen by the legisla-

16 ture, as the secretary of state, state treasurer, and
17 councilors now are ?

18 And it now appearing by examination of said re-
19 turns, that a majority of the inhabitants voting on said
20 questions were in favor of said amendments, therefore

Resolved, That the constitution of this state is
2 amended as follows: In the sixth article it is
3 amended by adding the following sections at the end
4 of said article :

“SECT. 7. Judges and registers of probate shall be
2 elected by the people of their respective counties, by
3 a plurality of the votes given in at the annual election,
4 on the second Monday of September, and shall hold
5 their offices for four years, commencing on the first
6 day of January next after their election. Vacancies
7 occurring in said offices by death, resignation or
8 otherwise, shall be filled by election in manner afore-
9 said, at the September election, next after their occur-
10 rence ; and in the meantime, the governor, with the
11 advice and consent of the council, may fill said vacan-
12 cies by appointment, and the persons so appointed
13 shall hold their offices until the first day of January
14 thereafter.

SECT. 8. Judges of municipal and police courts

2 shall be elected by the people of their respective
3 cities and towns, by a plurality of the votes given in
4 at the annual meeting in March or April, and shall
5 hold their offices for four years from the Monday fol-
6 lowing the day of their election. Vacancies in said
7 office shall be filled by election at the next annual
8 meeting in March or April; and in the meantime, the
9 governor, with the advice and consent of the council,
10 may fill said vacancies by appointment, until the Mon-
11 day following said annual meeting.”

In the third section of the seventh article, it is amended so that said section shall read:

“SECT. 3. The major generals shall be elected by
2 the senate and house of representatives, each having
3 a negative on the other. The adjutant general and
4 quartermaster general shall be chosen annually by
5 joint ballot of the senators and representatives in
6 convention. But the adjutant general shall perform
7 the duties of quartermaster general, until otherwise
8 directed by law. The major generals and brigadier
9 generals, and the commanding officers of regiments
10 and battalions, shall appoint their respective staff
11 officers; and all military officers shall be commis-
12 sioned by the governor.”

The ninth article is amended by inserting at the end thereof the following sections :

“SECT. 9. Sheriffs shall be elected by the people of
2 their respective counties, by a plurality of the votes
3 given in on the second Monday of September, and
4 shall hold their offices for two years, from the first
5 day of January next after their election. Vacancies
6 shall be filled in the same manner as is provided in
7 the case of judges and registers of probate.

SECT. 10. The land agent and attorney general
2 shall be chosen annually by joint ballot of the senators
3 and representatives in convention. Vacancies in said
4 offices occurring when the legislature is not in session,
5 may be filled by appointment by the governor, with
6 the advice and consent of the council.”

And in all cases of election provided for by the
2 foregoing amendments of the constitution, the first
3 election shall take place on the days and times there-
4 by prescribed occurring next after the passage of this
5 resolve, and until said offices shall be filled by elec-
6 tions under and by virtue of said amendments, the
7 power of the governor and council in relation thereto
8 will remain unchanged.

STATE OF MAINE.

IN SENATE, February 14, 1856.

ORDERED, That 2,000 copies of the report of the Joint Select Committee, to which was referred the message of the late Governor and report of Council on the amendments of the Constitution relating to the elective franchise, with the Resolve accompanying said Report, be printed for the use of the Legislature.

WM. G. CLARK, *Secretary.*