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Public Officers and Institutions

FOR THE YEAR

1890.

VOLUME I.

AUGUSTA:
BURLEIGH & FLYNT, PRINTERS TO THE STATE.
1892

REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF MAINE.

1889.

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STATE OF MAINE.

ATTORNEY GENERAL'S OFFICE,
ROCKLAND, December, 1st, 1889.

To the Governor and Council of the State of Maine:

I have the honor to submit herewith my report of the business of this office for the preceding year.

OPINIONS.

Beside numerous matters, upon which I have had occasion to advise the Governor and Council, and the various State departments, the following opinions, upon the request of the Governor, have been rendered:

GOVERNOR'S QUESTIONS.

EXECUTIVE DEPARTMENT,
AUGUSTA, March 30th, 1889.

Hon. Charles E. Littlefield, Attorney General, Rockland, Maine:

DEAR SIR—Your opinion and advice is respectfully requested upon the following questions:

First—Will chapter 313 of the Public Laws of 1889, when it takes effect, vacate the offices of the present board of railroad commissioners?

Second—Will members of the legislature of 1889-90 be eligible to appointment, as railroad commissioners, under said chapter?

Third—What is the duty of the Governor as to appointments under said chapter?

Very respectfully,

EDWIN C. BURLEIGH, Governor.

REPLY.

ROCKLAND, April 8th, 1889.

Hon. Edwin C. Burleigh, Governor:

DEAR SIR—The questions presented in your communication of the 30th ult., requesting my opinion and advice thereon, have been carefully considered by me, and I herewith respectfully submit my conclusions.

As to the first question "Will chapter 313, of the Public Laws of 1889, when it takes effect, vacate the offices of the board of railroad commissioners?" I have to say, that in my opinion it will not vacate the offices of the present board of railroad commissioners. The Act referred to, is amendatory of section 113, chapter 51 of the Revised Statutes. Before the enactment of this amendment, this section, so far as the question involved is concerned, read, "The Governor, with the advice and consent of council, shall appoint three railroad commissioners, who shall act as a board and hold their offices for three years; two of them shall be experienced in the construction and management of railroads, and one of them shall be an engineer." As to this point, chapter 313, Public Laws of 1889, section 1, (all other provisions of the new statute being immaterial on this point,) reads: "The Governor, with the advice and consent of the council, shall appoint three railroad commissioners who shall act as a board and hold their offices for three years; one of them shall be learned in the law and appointed and commissioned as chairman; one of them shall be a civil engineer who shall have had experience in the construction of railroads; and the third shall have had experience in the management and operation of railroads." The only change in the law is the striking out of the words "two of them shall be experienced in the construction and management of railroads, and one of them shall be an engineer;" and inserting in lieu thereof, the words "one of them shall be learned in the law and appointed and commissioned as chairman; one of them shall be a civil engineer who shall have had experience in the construction of railroads; and the third shall have had experience in the management and operation of railroads." In other words, the law of 1889, prescribes special qualifications for

individual members of the board, that were not so required, when the members of the present board were appointed. The question is do these special qualifications apply to commissioners who *have been* appointed, or to the board as now constituted, so as to vacate their offices; or do they apply only to commissioners *to be* appointed as vacancies occur, and the board as thus constituted? Is the law prospective or retrospective in its operation? The rule by which such legislation is to be construed, is familiar and well settled. Chief Justice Fuller, speaking for the United States Supreme Court, states it thus: "Constitutions as well as statutes are construed to operate prospectively, only, unless, on the face of the instrument or enactment the contrary intention is manifest beyond reasonable question." Shreveport *vs.* Cole 32, L. C. P. 589, (129, U. S. 39.) Folger, J. in the opinion of the court in People vs. Green, 58, N. Y. 304, says: "A law may not operate upon existing rights and liabilities without it in terms expresses such intention. Though there is no vested right to an office which may not be disturbed by legislation, yet the incumbent has, in a sense, a right to his office. If that right is to be taken away by statute, the terms should be clear in which the purpose is stated." "It is a rule of construction to give a statute prospective operation only, unless its terms show a legislative intent that it should have retroactive effect," the court said in Garrick *vs.* Chamberlain, 97 Ill., 620, "A public officer cannot be deprived of the power conferred upon him for public purposes by implication." Anderson *vs.* Van Tassell, 53, N. Y. 631. A *fortiori* he cannot be deprived of the office itself by implication. See also, Holmes *vs.* Wiltz, 11, La. 439. Keeping this rule in mind, a brief analysis of this law will clearly show it to be prospective in its operation. It does not in terms apply to the present board. It does not abolish the office, and create another. It does not say that the present board shall even possess the special qualifications. It does not intimate that they do not possess them. It does not even say, that no commissioner shall act unless he possess the special qualifications.

It does not in any way refer to the present board. The title of the Act, "An Act amendatory of section 113, chapter 51 of the Revised Statutes, and additional to said chapter, relating to railroad commissioners," contains no indication of an intention to abridge the tenure of office of the commissioners. The Governor is not even required to appoint at any specific time, commissioners

with the special qualifications. The provision as to appointment, as to when they are to be made, has not been changed. The statute read, "the Governor shall appoint three railroad commissioners who shall act as a board and hold their offices for three years." This law reads precisely the same. Beyond all cavil this clause, as the statute stood, meant that appointments should be made as vacancies occurred. No change of any kind having been made in the language, what is it that has wrought so fundamental a change in its meaning? Is there any warrant for holding that the next clause, providing only for special qualifications in the appointees, saying nothing about when appointments are to be made, works so radical a change in the meaning of the preceding language, with no change in its tenor? Is it not more in consonance with reason to assume that the legislature apprehended its import, and making no change in its terms, intended no change in meaning? To vacate these offices the law should have read "shall appoint forthwith." But it does not so read. Had there been an intent to vacate these offices, it would not have been difficult to have plainly expressed it in terms about which there could be "no reasonable question." The single word "forthwith," in the proper place, would have accomplished the result. If the legislature intended to deprive these commissioners of their offices, what reason can be given why this purpose should not be declared in the Act in "clear and unmistakable terms," making the intent "manifest beyond reasonable question?" Why should not the "terms" be "clear" in which the purpose is stated?" It is too obvious for argument that this act of 1889 does not in "terms" declare any such purpose. If it has any such effect, it is accomplished by doubtful implication and indirection.

There is every reason why this result should not be thus accomplished. If the "intent" is not "clear" and "manifest beyond reasonable doubt," how can we be assured that the members of the legislature understood its purpose? Did its title, or terms, contain any clear notice "manifest beyond reasonable question" to the present board that they were being deprived, without notice and hearing, summarily and arbitrarily, of valuable rights? While I do not hold that it is, or is not, competent for the legislature to eject an officer, by legislative act, from an office created by the legislature, without notice or hearing, it is well to remember, as illustrative, at least, of the spirit of the law, that the constitutional provision, regulating removals from office, while providing

that "every person holding any office" may be removed by address, also provides "But before such address shall pass either house, the causes of removal shall be stated and entered on the journal of the House in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defense." Con. Art. IX., Section 5. Grave doubts may well be entertained, whether it is competent by mere act of the legislature to deprive an officer of his office; but, to hold that an act of the legislature, deprived any officer of his office, when it did not on its face, declare such a purpose "beyond reasonable question," thus depriving him of notice, and of an opportunity for a "hearing in his defense," would be to my mind, repugnant to every sense of justice and honorable dealing. Such a construction should never be given to a statute. There is no difficulty as I construe this law, in accomplishing its purpose, as to the personnel of this board, by making appointments in their order, as vacancies occur. Thus the purpose of the statute is accomplished, and its literal terms complied with, without the invasion of any rights.

The cases sustain this application of the rule. In People *vs.* Haskell, 5 Cal. 357, under a general law, Haskell was elected clerk of the Superior Court, in San Francisco, at a September municipal election, to hold office "for two years from and after his election." Subsequent to his election, and before the expiration of his term the charter of San Francisco, was amended so as to provide for the election of "all officers to be elected for the whole city" on the fourth Monday of May, also that the "officers" elected, should "enter upon the duties of their respective offices on the first Monday in July following." The relator was elected in May, and was held to be an officer "for the whole city." A literal construction of the act, would have ejected Haskell, and given the relator the office. Yet the court held that although he was properly elected, he was not entitled to the office until "the expiration of two years from the date of defendants election." They say the legislature has the power to alter or abridge an office of legislative creation, "But in this case we do not think it was the intention to do so." A section of the charter of 1873 of the city of New York, which in substance, provided that any person holding office who should during his term accept a seat in the legislature, should be deemed thereby to have vacated his office, was held prospective, and not to vacate the city office held by a member of the assembly, at the time of

the passage of the charter. People *vs.* Green, Supra. In both of these cases it will be perceived that the implication of removal is much stronger than in the case we are considering. The cases of Gill *vs.* Milwaukie, 21, Wis. 449, and Currier *vs.* Boston and Maine Railroad, 11 N. H. 209, are illustrative of similar applications of the rule. The only case that I find which at all militates against this construction, is Bryan *vs.* Cattell, 15 Iowa, 538, where it was held that a statute which provided that the acceptance of a commission to any military office, which required the incumbent to exercise his duties out of the State, for more than sixty days, vacated any civil office held under the State, in effect vacated the office of District Attorney, though the incumbent had accepted his military commission, before the enactment of the statute. This however, was an action to recover for salary, and it appeared that the plaintiff had not performed the duties of the office, or rendered any services, and the court held, that "having made no claim for months to the office" he was "estopped from demanding the State salary," and that he could not "gainsay the right of the Executive to fill the office," not because there was an actual vacancy, but, "as in case of a vacancy." This does not, therefore, affect the position. On the other hand, in nearly every case where an act of the legislature has been held to affect the tenure of an office, I find the act has, either "declared the office vacant," fixed a time beyond which the incumbent should not act, or a specific time when the new official should begin to act. Such are, People *vs* Van Gaskin, 5 Mont. 303; In re Bulger 45, Cal. 553; Alexander *vs.* McKenzie, 2 So. Car., (Rich.) 81; Dickinson *vs.* Banvard, 27 Cal. 470; Robinson *vs.* White, 26, Ark. 139; Territory *vs.* Pyle 1 Oregon, 148; and Attorney General *vs.* Squires 14 Cal. 12. Moreover, there is authority for the proposition, that an officer, with a fixed tenure, cannot be removed by mere act of the legislature, though the weight of authority is otherwise. See Holmes *vs.* Wiltz, 11 La. 439, and Peters *vs.* McAlister, 11 Ohio, 46. In the last case the court used this expressive language, "I concur with the counsel for the defendant that the legislature has no power by retrospective legislation to deprive a man of an office. When a man becomes an incumbent of an office, he has a vested right in that office and all such rights are supported by the constitution. An act that would attempt to deprive him of this right would savor more of despotism than of constitutional legislation. The legisla-

ture may prescribe rules prospective by which he shall be controlled, and these he is bound to obey; but to oust him from office by direct legislation cannot be done." It does not become necessary in this case, however, to determine whether it is within the power of the legislature to remove an officer by direct legislation, as, for the reasons above given, I am entirely satisfied that such a result is not intended by chapter 313 of the Public Laws of 1889.

In answer to your inquiry as to whether members of the legislature of 1889-90 will be eligible to appointment as railroad commissioners under said chapter, I have to say, that they will not be eligible until the expiration of two years from the first Wednesday of January 1889. Art. IV, Part 3, Sec. 10, of the Constitution, provides that "No senator or representative shall during the term for which he shall have been elected, be appointed to any civil office of profit under this State which shall have been created, or the emoluments of which increased, during such term, except such offices as may be filled by election by the people." The office of railroad commissioner is unquestionably a "civil office of profit." It is clear that the "emolument" of this office has been increased during the term for which the members of the legislature of 1889-90, have been elected. The provision of law fixing the compensation of the railroad commissioners, prior to the legislation of 1889, is found in the Revised Statutes, chapter 51, section 113, and reads thus, "Their compensation shall be five dollars a day while actually employed in their official duties." I find nothing in the law that authorizes them to receive any other fee or compensation. If they were "actually employed" every secular day in the year their "compensation" could not exceed $1,565, (or possibly $1,570 in a leap year) in any one year. Chapter 313 of the Public Laws of 1889, provides "The compensation of said commissioners, and clerk, which shall be in full for all services to be performed by them, shall be two thousand dollars per annum for each commissioner, and twelve hundred dollars per annum for the clerk." Their compensation for full time under the old law would amount to only $1,565. Under the new law it amounts to $2,000. An increase in "emolument" of $435. A statement of the case decides it. That the duties to be performed under the new law are in excess of those previously imposed, does not affect the increase of the "emolument" received. Constant actual employment for a full year under the old law, would result in an "emolument" of only $1,565. The com-

missioners can hardly devote more time to the duties of the office, in one year, under the new law.

In answer to your inquiry as to "What is the duty of the Governor, as to appointments, under said chapter?" I have to say that, inasmuch as this chapter contemplates that the board of railroad commissioners to be appointed, under its provisions, shall consist of three commissioners, each having separate and distinct qualifications, the object of the law can be adequately accomplished only by filling vacancies as they occur, in the board as now constituted, by appointing the commissioners in the order mentioned in the law. To fill the first vacancy, one, "learned in the law," who is to be "appointed and commissioned as chairman." To fill the second vacancy, a "civil engineer who shall have had experience in the construction of railroads." To fill the third vacancy, one who has "had experience in the management and operation of railroads." In order to avoid confusion, the appointment and commission in each case, should indicate the position and qualification of each commissioner appointed. Vacancies occurring after such appointments, would then be filled by a commissioner, with like qualification, as the outgoing commissioner. Thus the manner in which the board was constituted, and the respective positions of each commissioner, would always be a matter of record.

Very respectfully,

CHARLES E. LITTLEFIELD.