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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,
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 proposition:

The legislature of 1889-90, passed the following resolves, all of which require the appointment of commissioners, for the carrying out of their respective provisions, viz: "Resolve relating to the removal of the Maine State Prison;" "Resolve to provide a commission to inquire into the system of taxation of other states and this State, and report to the Governor and Council;" "Resolve authorizing the Governor to appoint a commission to select and purchase a site for an Insane Hospital;" and a "Resolve in favor of settlers in Madawaska Territory."

Are members of the legislature of 1889-90 eligible to appointment as commissioners, under either, or all, of said resolves, and what would you advise relative to said appointments?

Very respectfully,

EDWIN C. BURLEIGH,

Governor.

ROCKLAND, April 9th, 1889.

Hon. Edwin C. Burleigh, Governor:

DEAR SIR—Your communication of March 30th, requesting my opinion and advice, relative to several resolves passed by the legislature of 1889-90, and the eligibility to appointment, thereunder, of members of that legislature, has been carefully considered by me, and I beg leave to respectfully submit the following: As to the eligibility of members of that legislature to appointment as commissioners, under the three resolves, "Resolve relating to the

removal of the Maine State Prison;" "Resolve to provide a commission to inquire into the system of taxation of other states and this State, and report to the Governor and Council;" "Resolve authorizing the Governor to appoint a commission to select and purchase a site for an Insane Hospital;" I have to say, that answering this question, in accordance with the opinion of our own court, and the weight of authority, which I feel bound to do, I answer it in the affirmative, and hold that they are eligible to appointment under these resolves.

This question arises under Art. IV, Part 3, section 10 of the Constitution, which reads, "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, provided, that this prohibition shall not extend to members of the first legislature." The question is, would a commissioner appointed under these resolves, hold a "civil office of profit?" Our court construed these words, in an opinion, (3 Me. 481,) answering the question as to whether the agency provided for by the following resolve, was a "civil office of profit," holding that it was not. On this point, the resolve (chapter 26, resolves of 1822,) read, "The Governor by and with the advice and consent of Council, be and is hereby authorized and empowered to appoint one or more agents whose duty it shall be to perform all duties relative to the care and preservation of the timber and grass on the public lands, and the sale of any part thereof, as shall from time to time be prescribed by the Governor of this State; and the said agents or agent shall receive such reasonable compensation for their services out of the proceeds of any timber or grass by him, or them, sold under the authority aforesaid, and as the legislature shall direct." In Burns *vs.* People, 45 Ill., 397, the court held, that commissioners to build a State House, were not "officers," citing and relying upon, 3 Me. 481. In Shepherd, *vs.* Commonwealth, 1, Serg. and R. 1, it was held that a commissioner who settled the compensation to claimants to lands in Lucerne county, did not hold an "office of profit," though compensation was provided for his services, the court saying that "it was rather the execution of a special commission, than a holding of an office," language singularly applicable to the commissioners under these resolves. Where a judge was appointed for the purpose of investigating the genuineness

of certain relics, and certifying accordingly, it was held that such an appointment was not an "office" or public trust. Washington *vs.* Nichols, 52, N. Y. 478. Persons appointed by act of the legislature to conduct and execute and manage a lottery grant, involving a large sum of money, to be used for public purposes, (no compensation was provided,) were held not to be "public officers." State *vs.* Platt, 4 Del. (Harr.) 166. In Underwood *vs.* McDuffy, 15, Mich. 361, the court held that "executive officers" were "not created by the temporary nomination for a single and transient purpose," and that "Every public office includes duties to be performed constantly or as occasion arises during some continuous tenure," which is not the case with these commissioners. An "office" involves an "employment or duty" that "is a continuing one." Hill *vs.* Boyland, 40 Miss 625. That the duty must be a continuing one, and defined by rules prescribed by law, were held essential elements of an "office" by Chief Justice Marshal, in United States *vs.* Morriss 2 Brock, 103. In United States *vs.* Hatch, 1 Pinney, 182, "officers" to manage and dispose of land donated to a territory to aid in the construction of a railroad, were held not to be "civil officers" within the meaning of the Constitution, the court relying upon 3 Me. 481, as in point.

On the other hand, commissioners to construct a highway, were held to be "officers," but, mainly on the ground that they exercised a part of the "functions of government." (The right of eminent domain,) People *vs.* Nostrand, 46 N. Y., 375. Commissioners to make a geological survey, were held to be "public officers," but the office was in one sense a continuing one, provision being made for removals, and filling vacancies, and in that case the court intimated that there was a distinction between such offices as they were considering, and the term "office" which requires a more strict construction, as used in a constitutional clause. Hall *vs.* State, 39 Wis. 79. In Commonwealth *vs.* Evans, 74 Pa. St. 124, an agent appointed to collect claims against the United States, was held to be a public officer, within the provisions of a statute excepting "public officers" from the operation of the law abolishing imprisonment for debt. This was a case where the agent was seeking to evade the payment of public funds, in his hands, and the case is controlled by that consideration. These three cases are, therefore, unlike the commissioners to be appointed under these resolves, and I have been unable to find any case where, with parallel facts, such commissioners have been held to be "public officers" or "civil officers."

It will be perceived that several of the above cases, that are in point, rely upon 3 Me. 481, and I find this case very frequently cited as authority when "office" or "civil office" is being defined. It is difficult to establish any substantial distinction between the "agents" in that opinion, and the "commissioners" here. That they are called "agents" in one case, and "commissioners" in the other, is not material, as it is the office or position itself, and not the name of the office or position that is of essence.

Inasmuch, however, as I do not feel satisfied with the construction adopted by the court in that opinion, and if I am to advise, cannot advise the appointments inquired about, though they may be legally competent, I ought perhaps, to give my reasons. In 3 Me. 481, in answering the question then before them, the court base their whole opinion upon Art. III, section 2 of the Constitution, which reads, "No person or persons belonging to one of the departments, (executive, legislative, or judicial,) shall exercise any of the powers, properly belonging to either of the others, except in the cases herein expressly directed or permitted." "With this provision in view" the court say "it seems proper to give such a construction of the Constitution as will be necessary to effect the object contemplated, which was to preserve the powers above mentioned, entirely distinct, except in the cases specified." Again they say, "By thus ascertaining the object which the framers of the Constitution had in view, in the distribution of powers, or division of the sovereign power, we apprehend the true construction to be given to the terms "office" and "offices" as used in the Constitution may also be ascertained." The purpose to keep the "powers above mentioned entirely distinct" is the only purpose expressed in the opinion. They treat this throughout as the only "object contemplated." The provision under which they were answering the question has already been quoted, Art. IV, Part III, Sec. 10. This opinion treats these two provisions of the Constitution as having one and the same purpose, as identical in meaning. They do not suggest any distinction of purpose and intent between the two. They invariably use Art. III, Sec. 2, as the standard for the construction of Art. IV, Part III, Sec. 10. Each provision is expressly prohibitory. Are they both intended to prohibit the same thing? I think not. I think there is a material and important distinction between the purpose and intent of the two provisions. The earlier is found under the article entitled "Distribution of

Powers." Its only purpose is to "preserve the powers" "distinct." The latter is found under the article entitled "Legislative Power." If identical in meaning with the former, the former covered the whole ground and the latter was an unnecessary repetition.

I do not think the latter is a reiteration of the principal declared in the former. It is not to be assumed that in so important an instrument as the Constitution, such unnecessary redundancy of expression would be tolerated. The purpose and intent of the latter is separate, distinct, independent, and more far reaching than the former. It does more than prohibit the person "belonging to one department" from exercising any of the powers belonging to another. It prohibits a member of the legislature from being "appointed to any civil office of profit" created by the legislature of which he was a member, not only while he "belongs to one department;" but "*during the term* for which he shall have been elected." So that, if such member ceased to "belong to one department" by resignation of his legislative office, he could not be appointed to any such "civil office of profit," "until the expiration of the term for which he shall have been elected." It is clear, then, that the purpose of the latter clause, is not to prevent the improper exercise of power in one department by those belonging to another, but to prevent the legislative creation of offices, to be filled by members of the legislature creating them. This purpose is not recognized in this opinion.

The court do not treat it as the "object contemplated." Instead of giving the terms "civil officer" a strict and technical construction, as the court do in that opinion, in order to "effect the object contemplated" by the earlier provision, as to the distribution of powers, I think they should receive a broader and more liberal construction, in order to "effect the object contemplated" by the latter provision, in which the term occurs, and which has a different purpose. Again, the language is, "civil office of profit." These words should be construed together. It is obvious that the words, "of profit" are of special significance, and should be given great weight in construing the whole clause. If it was an evil, and it is so pronounced by the Constitution, for a member of the legislature to participate in the creation of an office of profit, to be filled by himself, during his term, it does not require argument to show that the element of "profit" furnished the strongest incentive to the abuse of any power the legislature might have had in this direction. It is not so

much "any civil office," *per se*, that makes the inhibition necessary, but the "profit" issuing *from* the office. The underlying idea seems to be that no legislator, shall derive any personal "profit" from his action as a legislator. Whether an office is a "continuing one," involves an exercise of a "portion of the sovereign power," its duties are to be performed under the sanction of an oath, involves "carrying into effect any of the standing laws of the State," (all elements held to be necessary to constitute an "office") or otherwise, is of slight consequence, so far as the mischief sought to be prevented is concerned, while the element of "profit" issues from it. A "place," an "agency" a "commission" or an "employment," is equally within the principle involved in the mischief, (differing perhaps in degree) as is the most technical "civil office," if the element of profit, is alike incident to each. It is not so much, whether the profit continues for a longer or shorter time, is greater, or is less, it is still there. It is in the *fact* of profit, that the evil lurks. This element of "profit" as tending to aid in ascertaining the "object contemplated" is entirely overlooked in this opinion. In construing a statute which prohibited "increasing the salaries of those now in office," the court, in Rowland *vs.* New York, 83 N. Y. 372, said, in holding that an attendant on Supreme Court was within its provisions, "Its object was to limit or cut down expense; and the evil was an increase of compensation. The fruit and profit is in its sense and spirit; and so rendered includes the plaintiff's case. For, whether we consider the nature of the matter detailed or its obvious purpose, it is reasonable to suppose that the legislature had in mind when selecting the language above quoted, all persons who under any name were the recipients of salaries from the State, and in this sense the act should be construed." In order to give "effect to the object contemplated," in its " sense and spirit," by this provision of the Constitution, the term "civil office of profit," should, I think receive a construction, that would render a member of the legislature ineligible for appointment, "during the term for which he shall have been elected," to any place or position "of profit" under this State, in the creation of which he had participated as legislator.

I have stated that the law is held otherwise; but as my advice is asked as to your action in the premises, I feel bound to say, that while these appointments would be legally competent, they would, in my opinion, be in violation of the spirit of the Constitution, and I do not therefore feel justified in advising you to make them.

As to the commissioners provided for by the "Resolve in favor of settlers in Madawaska Territory," I have to say, that such commissioners would not hold a "civil office of profit," and that members of the legislature of 1889-90, would therefore, be eligible for appointment as commissioners under that resolve. The appropriation in that resolve, is "for the reasonable expenses of said commissioners" only. The Governor is to draw his warrant to pay "the expenses of said commissioners," only. No compensation is provided for.

Very respectfully,

CHARLES E. LITTLEFIELD,

Attorney General.

CASES FORMERLY CAPITAL.

There are now pending, argued, in the hands of the law court, awaiting their action, on appeals from the decisions of judges at *nisi prius* overruling motions for a new trial, the case of State *vs.* David L. Stain and Oliver Cromwell, and State *vs.* Charles L. Beal. These cases were both argued, in the Western District, at the July law term, 1889. In the case of State *vs.* Charles L. Beal, the defence being unable by reason of unavoidable delays, to present a copy of the case at that term, upon the suggestion of court, the appeal was heard on a statement of such facts as the counsel upon either side relied upon. As this case was tried before the beginning of my term of office, and I had no knowledge of the details, I was obliged to rely upon the County Attorney of Kennebec, L. T. Carleton, Esq., who assisted the Attorney General in the trial of the case, to present the case for the State. At my request he cheerfully and ably argued it.

At the request of E. P. Spofford, Esq., the County Attorney of Hancock County, I assisted him, at the April term, in the trial of State *vs.* Chandler Collins. This was an indictment for manslaughter. A trial of three days resulted in a verdict of guilty. The respondent was sentenced to two years imprisonment in the State Prison at hard labor, and is now serving out the sentence. Mr. Spofford had his case thoroughly prepared, well in hand, and discharged his duties in the trial with ability.