STATE OF MAINE.

REPORT

OF THE

ATTORNEY-GENERAL

FOR THE TWO YEARS ENDING

NOVEMBER 30, 1906.

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A plantation which has a clerk and other plantation officers is not an unincorporated place within the meaning of R. S., c. 81, sec. 26."

In this case the court considered the attachment recorded in the organized plantation good under a statute providing, in substance, that attachments (upon bulky property, etc.) made in towns, are to be there recorded, although another provision in the same statute provided, in substance, that when an attachment is made in an unincorporated place, it shall be recorded in the oldest adjoining town in the county.

I have also been informed from your office that as a matter of practice, these organized plantations are in the habit of keeping these records of births and complying with the statutes relating thereto in the same manner as do towns.

Under the foregoing, I would recommend and advise that the report of the birth in question be made to the clerk of the organized plantation. As indicated, I must confess that I am somewhat uncertain as to whether or not this is the correct view. It may be that the court would hold the statute means literally that the report should be made to the nearest *town,* rather than any *organized plantation.* If the matter is of importance, arrangements therefore should be made to have the question raised, and passed upon by the court, or else the statute amended at the coming session of the legislature, so as to be beyond any possible question as to its construction."

ROAD COMMISSIONERS. RIGHT TO TAKE MATERIAL WITHIN THE LIMITS OF HIGHWAY FROM ONE PLACE TO ANOTHER FOR PURPOSE OF CONSTRUCTION AND REPAIR OF WAYS.

In May, 1906, the question was submitted to us by the commissioner of highways as to what right, if any, a road commissioner had to take material opposite one man's land within the limits of the highway and carry it to some other point opposite another man's land for use in the actual construction or repair of the road.

On May 16, 1906, opinion was rendered to the commissioner of highways as follows:

"Your favor of May 11th, is at hand in which you ask as to the right of the road commissioner to take material opposite one man's land within the limits of the road and carry it to some point opposite another man's land for use in construction and repair of the road.

This question has been before the courts of last resort in several states and I respectfully call your attention to the language of those courts in a few instances.

In New Haven vs. Sargent, 38 Conn. 50, we find "The real question is whether the city of New Haven has a right, as against an adjoining proprietor, to take soil from one street in the network of streets in one particular part of the city and use it in another street of that network near, but not directly connected with, the street from which the soil is taken, for the purpose of making and grading such other street—such soil being reasonably necessary for that purpose." . . . "There has never been in our history a statutory provision prescribing the manner in which highways should be made. Nor has there been any provision in respect to the material of which to make them. By immemorial usage material has been taken for their construction within the limits of the highways of the town. Hills have been excavated and swamps and valleys filled up with the material taken from the excavation, and material existing in excess in one place has been taken to another where it was deficient." . . . "The inference derivable from the silence of the statute in relation to the manner in which material was to be obtained for the construction of the highways, from the immemorial usage in relation to it, and the necessity in which it originated, and from whatever judicial decision we have respecting it, is, very clearly, that it has always been contemplated and understood by the general assembly and the public that material for the construction of highways was to be taken within their limits and might be removed from any place where unnecessary to any place where its use was necessary, without regard to the rights of adjoining proprietors, if the necessity was a reasonabe one and the power was exercised in a reasonable manner."

In Denniston vs. Clark, 125 Mass., 216, we find "It is equally clear that the grant of such an easement to the public (easement in the highway) or to the corporation to which its rights

have been delegated, authorizes the doing of any act in the highway, including the digging down or raising the soil to any extent that is necessary or proper to make and keep the way safe and convenient for the public travel. All acts done for the purpose of repairing the way are of this character, although they may require the removal of the soil from one part of the way to another; and it is accordingly well settled that the public in the case of a highway, or a turnpike corporation or a railroad company in the case of a turnpike or railroad, has the right, acting through proper officers, for the purpose of repairing the same highway, turnpike or railroad, to take earth, gravel or stones from one part and deposit them on another, although if the officer applies them to *other uses* he may become liable as a trespasser."

The last cited case affords an interesting view of the English law upon the same subject which is in harmony with the decisions above cited. It will also be noticed on page 222, Vol. 125, Mass. Reports, from which we have just been citing, that the court makes this general observation: "In New England, at least, the same rule has been applied by law and usage to the taking of materials from one highway for the repair of another within the jurisdiction of the same municipal authorities," and quotes as one of its citations, Hovey vs. Mayo, 43 Me., 322.

I have thus endeavored to answer your queston in the language of courts of last resort whose reputation for judicial learning is unquestioned.

STURGIS BILL. PAYMENT OF CERTAIN FEES TO COMMISSIONERS AND DEPUTIES BY COUNTIES TO STATE TREASURER.

In October, 1906, the question was submitted to us by the State treasurer as to whether or not under the laws of 1905, chapter 92, familiarly known as the Sturgis Bill, the fees taxed for the commissioners and deputies in the bills of cost under section 6 of said act, should be paid over by the counties to the State treasurer whether they were collected from the respondents or not.

On November 2, 1906, opinion was rendered to the State treasurer as follows: