

MAINE STATE LEGISLATURE

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STATE OF MAINE.

REPORT

OF THE

ATTORNEY-GENERAL

FOR THE TWO YEARS ENDING

NOVEMBER 30, 1906.

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Again in *Birdsall vs. Clark* 73 N. Y. 73 we find the following: "If discretion and judgment are to be exercised either as to time or manner, the body or officer entrusted with the duty must exercise it and cannot delegate it to another officer or person."

My conclusion is, therefore, that Prof. Robinson in his office as State Assayer is charged with powers judicial and not ministerial and hence, cannot lawfully delegate those powers to another.

COUNTY COMMISSIONERS. ELECTION OF.

On November 23, 1906, an inquiry was submitted to us from the Governor and Council relating to the election of certain gentlemen to the office of county commissioner in Piscataquis county.

On November 24, 1906, opinion was rendered as follows:

As a preliminary and by way of making my opinion more clear, allow me to sketch the history of the legislation of county commissioners in this State in a brief way.

Under an act approved March 10, 1831, it was provided that the governor with the advice and consent of the council, should appoint three suitable persons as county commissioners in each of the several counties of the State. These appointees were to hold office for the term of four years unless sooner removed by the governor and council. In the revision of the Statutes published in 1841 the act of 1831 remained in force but the following year by an act approved February 22, 1842, it was provided that the county commissioners should be elected at the annual meeting in September for the election of their State and county officers. In the last named act it was provided that the county commissioner having the highest number of votes should hold office three years. The one with the next number, two years, and the one with the smallest number, one year, with provision as to procedure if two or more should have an equal number of votes. In the last named act it was also provided that all vacancies occasioned by expiration of term of office should be filled by the election of a successor on the second Monday of September next preceding such expiration. This act also provided for the election of other county officers and used the following language in respect to all such county officers including county commissioners:

“If the person chosen to either of said offices shall die, or resign, or move out of the county before the time for which he was elected shall expire, then, and in such case, the governor with the advise of the council, shall appoint some suitable person to fill the vacancy until another shall be chosen in his place, which election shall take place the second Monday of September next after such vacancy shall have happened.”

Before leaving the act of 1842 it is interesting to note that this is the first provision for election by the people and the three county commissioners were all to be elected at the same time, and very properly, the act should designate some way by which the term of office should be fixed and used the provisions which I have just cited. Such a condition was not likely to arise at any future period and the question may well be asked if it would not have been wise to have omitted this provision after the election machinery of the county commissioner had become well established.

In any event the provision has been retained in the statute and has evidently been the cause of some confusion.

In the revision of the statutes in 1857 the provisions of the act of February 22, 1842, were retained and the distinction created by a vacancy occasioned by the expiration of term of office from a vacancy made by death, resignation or removal from the county, was preserved.

The revision of the statutes in 1871 (with a slight verbal change in Section 1 of the chapter relating to county commissioners) contained the exact provision of 1857. In the meantime our Maine court in the year 1863 (Opinion of the Justices 50th, Me. 607) had interpreted those sections relative to the election of county commissioners. An examination of the case will show that one Hemingway on the second Monday of September 1860, had been chosen county commissioner for the county of York (terms were then for three years). His term of office would expire January 1, 1864. He served one year and resigned. Alfred Hall was appointed by the governor to fill the vacancy thus created and entered upon the discharge of his duties January 1, 1862. During the year 1862 in which he was thus serving, Samuel Hasty was elected “to fill the vacancy by said resignation of said Hemingway” and the court was asked to answer this question “for how long a time was said Samuel Hasty elected to serve as county commissioner by force of the

statutes of this State in such cases made and provided." The court answered the question by saying that Hasty was elected to fill the place made vacant by the resignation of Hemingway whose original term of office would expire the first day of January 1864, and called attention to the fact that there was a provision for filling vacancies occasioned by death, resignation or removal from the county as distinguished by a vacancy created by the expiration of a full term, so that Hasty was elected for the term which would expire January 1, 1864, a short term so to speak.

Meanwhile, in 1863, the voters of York county had elected Alfred Hall as a county commissioner to begin a term of office January 1, 1864, and in view of the condition with reference to Hasty the court was asked whether Hall was legally elected and was asked in effect whether Hasty's term of office would close January 1, 1864, and Alfred Hall would begin service at that date. The court answered that Alfred Hall was to begin his term of service January 1, 1864, because Hasty had been elected for the short term, or in other words, had been elected to complete a term which had been begun by Hemingway. In 1880 by act approved March 18th, of that year, the legislature made such revision as would make the election of county commissioners applicable to biennial elections and raised the terms of office from one, two and three years to two, four and six years, but the other provisions of the statute remained unchanged.

The revision of 1883 finds no change over the provisions of 1880.

Meanwhile between the revisions of 1871 and the revision of 1883, to wit, in 1872, our court referred again to this subject in Opinion of Justices 61 Me. 601, where in referring (page 603) to the election of the members of the board of county commissioners, this language was used:

"Vacancies might occur in the board by death or resignation. To meet this contingency and still preserve the annual election of its members, the statute provided for a choice to fill the place which was vacant. Considering the clearly expressed design of the legislature to elect a board upon the different years, this phraseology of the statute was held to refer to the unexpired term. Such a construction was deemed not only reasonable but necessary to maintain and preserve the essential element in the constitution of the court."

The revisions of the statute of 1903 were identical with the revision of 1883 and an examination of the acts of 1905 do not show any change from the conditions existing in the revision of 1903.

In short, the provision for electing county commissioners (except as related to biennial elections) have remained practically unchanged in this State since February 22, 1842, and the court has twice told us that there is a distinction between the filling of a vacancy cause by death, resignation, or removal from the county and a vacancy created by the expiration of a full term. The court has very distinctly said that when there is an election to fill a vacancy of the former class, then the person so elected was to complete only the term which would have otherwise been completed had there been no death, resignation or removal from the county.

You do not inform me whether the ballots cast in Piscataquis county distinctly stated that either of the gentlemen voted for as county commissioner was distinctly voted for as one who was to fill the vacancy caused by the death of Eben M. Bray, but in view of the statements made in Mr. Hayes letter I am forced to believe that if Mr. Blanchard was nominated with a full understanding upon his part and upon the part of the voters in Piscataquis county to fill out the unexpired term of Mr. Bray, then the certificate should be issued to Mr. Blanchard which would expire December 31, 1908, that being the time when Mr. Bray's term would have expired if he had lived. For the same reason I think that Mr. Holmes should receive a certificate of election for six years.

In other words, I think that the action of the governor and council with reference to this certificate of election should be based upon the provisions of R. S., chapter 80, section 3, rather than upon section 2 of the same chapter.

BONDS OF PUBLIC OFFICERS.

In November, 1906, an inquiry was submitted to us from the Secretary of State as to whether the bond for clerk of courts in Cumberland county may be signed by an indemnity or surety company instead of by individual surety and if so in what manner.