PUBLIC DOCUMENTS

OF THE

STATE OF MAINE

BEING THE

REPORTS

OF THE VARIOUS

PUBLIC OFFICERS
DEPARTMENTS AND
INSTITUTIONS

FOR THE TWO YEARS

JULY 1, 1928 - JUNE 30, 1930

STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

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for the calendar years

1929-1930

The active administration of the details of the Act for my department is at present in charge of Richard Small, Esq., whose home office is 85 Exchange Street, Portland, but who will be frequently in Augusta to give assistance on and to work out the cases. Either Mr. Small or myself would be very glad indeed to talk with you at any time with regard to general problems or any particular questions arising under the Act to the end that it may be administered with my department cooperating with yours to the best interests of all concerned.

Very truly yours,

CLEMENT F. ROBINSON
Attorney General

REFERENDA

November 25, 1929

Dr. Ernest H. Gruening,
Portland, Maine
My Dear Dr. Gruening:

Because of the interest taken by the public during the last few weeks in the action of the Governor on the referendum petitions, I am glad to carry out your suggestion and set forth in a public letter my understanding of the principles of law which rule the action of the Executive in such cases, which I studied out when advising with him on the petitions. Letters that I have received recently and the discussion in the newspapers indicate that there may be some current misunderstanding of the law.

Fundamentally, the Executive must follow the law

First and fundamentally, the Governor in passing on the validity of referendum petitions, must be governed by law. His conclusion is final; no court or legislature can review or reverse it. But he must be guided in reaching his conclusion by the rules enunciated by the courts for testing and finding the facts.

Any other principle would lead to anarchy. To criticize the Executive for carrying out the law as defined by the courts would show a misapprehension of our system of government, thoughtless, careless or misinformed; or else would be Bolshevism.

Lapse of time after law is settled is legally immaterial

It is a well settled corollary to this fundamental constitutional principle that mere lapse of time after the announcement of a positive principle of law by a court does not change the principle. Chief Justice Marshall's ruling in the famous cases of Marbury v. Madison, the Dartmouth College case and other landmarks of Federal Constitutional law stand as the law of the nation, although they were put forth a century ago. A court's positive statement of constitutional law whenever made stands effective. No good citizen will set himself above this

law, or try to justify a breach of law by an assumption that the court, from changing personnel and lapse of time, would reverse itself if called on anew.

Where the law is found

For the law which defines the duty of the Governor on referendum petitions we can look to but two sources,—the Constitution of the state, and the decisions of our Law Court interpreting the Constitution. There are no statutes.

The Referendum Amendments

The Constitutional provisions are comprised in the thirty-first amendment to the Constitution, known as the Initiative and Referendum Amendment, adopted in 1908. Section 17 and a portion of Section 20 of that amendment are as follows:

> "Sec. 17. Upon written petition of not less than ten thousand electors, addressed to the governor and filed in the office of the secretary of state within ninety days after the recess of the legislature, requesting that one or more acts, bills, resolves or resolutions, or part or parts thereof passed by the legislature, but not then in effect by reason of the provisions of the preceding section, be referred to the people, such acts, bills, resolves, or resolutions or part or parts thereof as are specified in such petition shall not take effect until thirty days after the governor shall have announced by public proclamation that the same have been ratified by a majority of the electors voting thereon at a general or special election. As soon as it appears that the effect of any act, bill, resolve, or resolution or part or parts thereof has been suspended by petition in manner aforesaid, the governor by public proclamation shall give notice thereof and of the time when such measure is to be voted on by the people, which shall be at the next general election not less than sixty days after such proclamation, or in case of no general election within six months thereafter the governor may, and if so requested in said written petition therefor, shall order such measure submitted to the people at a special election not less than four nor more than six months after his proclamation thereof."
>
> "Sec. 20. As used in either of the three preceding sections * * * 'written petition' means one or more petitions written or printed, or partly written and partly printed, with the original signatures of the petitioners attached, verified as to the authenticity of the signatures by the oath of one of the petitioners certified thereon, and accompanied by the certificate of the clerk of the city, town or plantation in which the petitioners reside that their names appear on the voting list of his city, town or plantation as qualified to vote for governor."

Clue to its interpretation; the referendum is legally a privilege

The Referendum Amendment has been applied in several decisions of the Law Court which I will mention. The clue to the interpretation and application of these decisions is this: The Referendum Amendment confers a privilege which was new to our system of government. To make this privilege available in any case, all the preliminary requirements imposed by the Amendment itself must be strictly conformed to.

Examples of similar legal privileges

Analogies to the privilege of voting and the privilege of making a will illustrate this point.

The unthinking person might say that everyone in the community should vote. Perhaps an approximation to this result will eventually be reached, but the history of the suffrage shows that the privilege of voting has always been safeguarded. Successive bars have been let down only after careful consideration and discussion. Men and women, citizens of Maine above the age of twenty-one who can read and write may now enroll and vote; but many residents of the State who have an actual capacity to take an intelligent part in public affairs are debarred at every election because they are not citizens of the state, have not acquired a voting residence, have omitted to go through the formalities necessary for enrollment on the voting list, were deprived of an education in their youth through no fault of their own, or on election day are confined to their homes by illness. The Constitution and the statutes indicate that the community feels that it is better for the community that these competent individuals should be deprived of the right of sharing in the election of officials than that the opportunities for fraud and mistake should exist from further extension of the suffrage, or a voting by proxy.

Again it may seem to the ordinary citizen that his right to dispose of his property at, or in anticipation of his death, should not be limited by the technical requirement of a will signed by himself and three witnesses in each others' presence. Such, however, is definitely the law coming down from generations of past experience. Recently suggested modifications with respect to bank deposits show that the policy may be altered in the future, but it is safe to say that every modification will be limited in effect by the general principle that the right to convey one's property at or in anticipation of one's death, is a privilege which the law permits. Only one who conforms to the technical requirements of the law can avail himself of the privilege.

The four reported cases on referenda

The Law Court has considered the Referendum Amendment on four occasions.

In 1915 Governor Curtis submitted thirteen questions to enable him to determine whether or not the referendum had been duly in-

voked on the Act of the Legislature of 1915 dividing the Town of Bristol. These questions are found in 114 Me. 557. The answer of the Law Court follows on Page 564. Applying the principles so laid down, Governor Curtis found that the referendum had not been properly invoked.

Next, in 1917, Governor Milliken submitted nineteen questions to the Law Court bearing on referenda on four Acts of the Legislature of 1917 concerning respectively Inland Fisheries, Sea and Shore Fisheries, a Police Commission for the City of Lewiston, and a State Paper. These questions are found in 116 Me. 557. The answers of the Law Court follow on Page 566. Applying the rules which the Court laid down, referenda in these four cases also were withheld from the people.

In 1919 a referendum was invoked on the Resolve of the Legislature ratifying the Eighteenth Amendment to the Federal Constitution. On inquiry made by Governor Milliken of the Law Court, reported in 118 Me. 544, the Court again analyzed the referendum amendment, and in its answer to the Governor's question, held the referendum inapplicable, and it was withheld from the people.

Finally in 1927 the Senate requested the opinion of the Justices on signatures to initiative petitions then pending before the Senate. The Court in its reply reported in 126 Me. 621, answered the questions. The Legislature declined to pass the initiated law; the Governor subsequently submitted it to the people and it failed of adoption.

These cases put it up to the Governor to be almost skeptical of petitions filed

All these cases consistently impose upon the Governor a duty which may be aptly summarized in the monition that he should be critical of petitions submitted almost to the point of skepticism. The point of view of the Law Court in its answers to all the questions submitted is wholly negative against the validity of the petitions, and in almost no respect positive in their favor, and this same point of view the Court imposes on the Governor. The Court puts the whole burden of proof upon the proponents of a referendum.

The Governor must look for defects and exclude defective names. He has no right, power or duty to help along a lame petition. Every defective petition or name which comes to his attention must be cut out from the count; in no case can he add to or supplement favorably a defective petition.

The Court puts it up to him in such language as this:

> "There is no power to pass on this question except that conferred upon the Governor." (116 Me. 579).
>
> "The Governor alone is clothed with the power to determine and declare whether in a given instance it appears that the required number of bona fide electors have so expressed themselves." (116 Me. 581).

The Court says that:

"The rights of the people in having a law passed by the legislature take effect, may be thwarted by having the referendum invoked by less than then thousand actual electors." (116 Me. 579).

Again on Page 581 of the same case, the Court says:

"It was not intended that a non-emergency measure should be suspended beyond the ninety-day limit unless ten thousand bona fide electors should so express their individual wish and ask for a referendum to the people."

In short, the referendum is a privilege and the people cannot have it unless they legally deserve it; and the Governor has the duty of blocking the way when the privilege has not been legally earned.

Nevertheless, valid petitions are easily prepared

From all this it is not to be concluded that proponents of a referendum need feel hopeless.

Really, although the Law Court has concerned itself with the many defects which require a Governor to eliminate referendum petitions, in whole or in part, nevertheless it is plain that after all it is a simple matter to submit referendum petitions that conform to law. During the twenty years since the referendum amendment has been a part of our system several referenda have been requested which the Governors have found, after careful examination to be duly and legally invoked. These have, therefore, been duly submitted to the people.

Before classifying the possible defects for which the Court has instructed the Executive to eliminate petitions, it will perhaps be worth while to summarize simply the affirmative requirements which, if conformed to, justify the Executive in validating a petition. These might well be printed on future referendum petitions for the instruction of petitioners.

1. Individuals must sign with their own hands. A signature by proxy, agent or typewriter is no more valid than would be a vote by proxy. (116 Me. p. 578, A7A; 579, Q8).

The Court says:

"In a sense, the signatures on referendum petitions take the place of votes at an election. No one can act as proxy for a voter. Each must express his individual wish by signing his own name or making his own mark."

On the other hand signatures by mark (116 Me. 563, Q11), or by using initials (116 Me. 576, Q 5A, 5B; 577, Q6A) are legally proper.

2. One of the signers of the petition must make the verifying certificate. (114 Me. 568, Q1; 570, Q6; 116 Me. 586, Q17). A town clerk who is a signer may, however, be also the verifying petitioner. (116 Me. 573, Q2).

3. The certificate of the verifying petitioner must state his knowledge that all the signatures are valid. (114 Me. 567). Mere clerical errors in this verifying affidavit can, however, be disregarded. (See instance given in 116 Me. 585, Q15B; 114 Me. 574, Q12). A Notary Public who takes the affidavit need not annex his seal. (116 Me. 586, Q18).
4. The verifying petitioner must in fact know that the signatures are genuine. The Law Court defines the basis of his knowledge in 126 Me. 622, Q3. The easiest way to fulfill this requirement is for the verifying petitioner to see the signing; but to some degree his verification will cover knowledge of the signing gained in other ways although it will not extend to justifying his certification based simply on hearsay. (126 Me. 622).
5. The town clerk must certify that the signers including the verifying petitioner are voters,—and here also clerical errors in his certificate may be disregarded.

   (In addition to citations under 3 above see 114 Me. 575, Q 13; 116 Me. 585, Q15A.)
6. The town clerk must in fact know that the signers are voters. (See citations under 3 and 4 above). Definite evidence would be required to contradict his affidavit to that effect. (116 Me. 560, 571, 572, Q1A, 1B, 1C).
7. The completed petition must be filed with the Secretary of State during the ninety days. No amendment can be permitted thereafter. (114 Me. 567).
8. Where several documents are pasted or fastened together they comprise but one valid petition as to the names preceding the verification and town clerk's certificate. Additional documents subsequently annexed must be disregarded. (114 Me. 568 and following pages; 116 Me. 573, Q3; 116 Me. 586, Q16).
9. A petition duly verified by one of the signers and also by the town clerk is valid irrespective of whether the verifier's or town clerk's affidavit were first annexed. (116 Me. 574, Q4).

Briefly, how it can be done

In short, we have a fairly simple problem which can be summarized thus: a referendum petition is effective for all actual signers who are voters provided that one of them certifies from his own knowledge, and actually knows, not merely by hearsay, the validity of all the signatures; that the town clerk certifies correctly to the voting list; and that the complete petition is filed within ninety days.

But the Governor must legally take a different viewpoint

This approaches the problem from the point of view of the persons invoking the referendum. The Governor, however, is concerned with the problem from the opposite point of view. It is up to him to throw out signatures and petitions unless the requirements are conformed

with. In other words, under the law it is plainly his duty not to seek affirmatively for grounds on which to sustain petitions or invalidity of signatures, but to inquire carefully into the reasons for eliminating signatures and petitions.

What former Governors have done

That previous Governors have seen their duty in this light is clearly indicated by the large proportion of referendum petitions which have been withheld from the people.

The figures are difficult to obtain because there is no provision of law requiring the Secretary of State or any other official to keep a permanent record of referendum petitions submitted to the Governor and no requirement for a proclamation by the Governor or other official when a referendum has been withheld after examination of the petitions, or has failed of adoption by the people after being submitted.

I do find, however, that there have been at least eight referenda withheld from the people prior to 1929 as against thirteen submitted. This covers the twenty years that the Referendum Amendment has been in effect.

In addition to the South Bristol Act withheld by Governor Curtis, and the four Acts withheld by Governor Milliken already referred to, Governor Baxter withheld the Owls Head-South Thomaston Act in 1921; and Governor Brewster withheld the initiative on the direct primary in 1925, and the gas tax referendum in 1927. This gives the total of eight.

On the other hand, three Acts were submitted in 1911; one in 1913; one in 1917; one in 1921; two in 1923; two in 1925; one in 1927; one in 1928,—a total of twelve.

The Governor's duty; to discard all petitions prima facie defective

Upon the problem which confronts the Governor when referendum petitions are submitted to him, it is clear that his procedure must be this:

(1) He must first determine whether or not the petitions are, on their face, valid. These that he eliminates for invalidity on their face are eliminated finally. No correction can subsequently be made, and no inquiry into the circumstance of their signature and filing is permissible. The petitions thus thrown out may incorporate hundreds of signatures of citizens signing in absolute good faith, may comprise the conscientious work of canvassers of the highest standing, nevertheless it is absolutely illegal for the Governor to receive any evidence or to give any consideration whatever to these circumstances if the petitions lack any of the prima facie requirements of the Constitution as elucidated by the Court. Any temptation to vary law to meet circumstances must be resisted not only by public officials, but also by every good citizen, otherwise the very foundations of our government are imperilled.

The Court has said in 116 Me. 568, that:

> "In order to warrant the counting of names on a petition, the petition itself must be filed within ninety days after the recess of the legislature and in form must contain two prerequisites, first a verification as to the genuineness of the signatures by a certified petitioner on said petition, and second, an accompanying certificate of the city, town or plantation clerk that the names of the petitioners appear on the voting list as qualified to vote for Governor. The former must be under oath, the latter need not be. The constitution itself prescribes these two indispensable accompaniments of a valid petition, and a petition which lacks either or both of these requirements is invalid and cannot be counted. Nor can a paper purporting to be a petition, which is invalid at the expiration of the prescribed time be rendered valid thereafter by the addition or correction of either the verification by the co-petitioner or the certification by the municipal clerk."

Previously the Court had said, 114 Me. 567:

> "A petition wanting either of these constitutional requirements is not a petition within the meaning of section 17 of the amendment. A paper that is not a constitutional petition within the ninety days cannot be made so afterward by adding affidavit or certificate. To do so would be in effect to extend the constitutional limitation of ninety days. The provision of the constitution is explicit and mandatory. In our opinion, the Governor is authorized to count the names only on such petitions as comply with the requirements of the constitution, and of those, only such as were filed within ninety days after the recess of the legislature."

His next duty; discard also petitions and names not actually valid even when prima facie valid

(2) Next, it is the duty of the Governor to examine with critical eye any petitions which are on their face regular in form, but which may be wholly or partly ineffective because of other considerations which come to his attention. To this end it is his duty to inquire into the actual circumstances with reference to signatures and verifications on any questioned petitions.

The duty of the Governor to test the petitions as they stand by the facts as he finds them to be is set forth in 116 Me. 579, where the Court says:

> "We think under this constitutional amendment the implied power to receive such evidence exists in the Governor, to whom it must 'appear' that not less than ten thousand electors have addressed him by petition, to inquire into and ascertain whether that number have addressed him and whether forgeries have been practiced upon him. If he finds after due notice to the interested

parties and especially to the verifying petitioner, the truth of whose verification is at stake, that forged signatures have been filed with him, it is his duty to reject them. A forged signature is no signature, and to hold otherwise is to make the verification on the petition conclusive upon the Governor, however firmly he may believe that fraud exists. 'The law abhors fraud' and stamps upon it whenever it appears. If the Governor is helpless to protect himself from fraud and forgery when it exists then the rights of the people in having a law passed by the legislature take effect, may be thwarted by having the referendum invoked by less than ten thousand actual electors."

And again in 126 Me. 622, in answering questions put by the Senate, the Court says:

"What constitutes personal knowledge sufficient to warrant verification is a matter within the sound judgment of the body, which must act upon the petition, which tribunal may also determine for itself the nature of the evidence it will receive upon this question and its weight."

In 116 Me. 569, Q 1A, 1B, the majority of the Court rules that evidence against the prima facie validity of the town clerk's certificate should be precise and definite, but even in this single instance where the Court has put on the brakes, Judge Spear dissented and felt that a mere letter was a sufficient basis for cancelling a city clerk's official return. (116 Me. 588).

Summary of circumstances which require him to eliminate petitions or names

Summarizing now from the point of view of the Governor some of the circumstances which oblige him to eliminate signatures or petitions, we have these cases among others:

1. He must eliminate as a whole any petition which was not filed complete within ninety days. (114 Me. 567); or which has a town clerk's signature made by his deputy or stenographer. (114 Me. 573, Q11); or which has a verifying petitioner who was not a signer of the petition. (114 Me. 568, Q1; 114 Me. 570, Q6; 116 Me. 568, Q17); or which has a verifying petitioner who is not certified as being a voter. (114 Me. 572, Q8). Even an inadvertent error in these respects cannot be corrected. (114 Me. 573, Q10).
2. He must eliminate all signatures not certified to by the town clerk, and all not included in the verification of the verifying signer. (116 Me. 582, 585, Q10, 12, 13, 14; 114 Me. 572, Q9).
3. Where several documents are annexed he must eliminate all signatures which do not precede the verifying affidavit and town clerk's certificate. (114 Me. 568-571, Q2-7; 116 Me. 573, Q3; 585, Q16).

4. On a further examination into the circumstances of those petitions which are on their face valid he must eliminate any petitions where there was fraud or error on the part of the town clerk. (116 Me. 581, Q9). Also he must eliminate all signatures which were not made by the actual voter (116 Me. 578, Q8), and he must eliminate all signatures of persons who cannot be actually attested as signers by the verifying petitioner according to the test laid down by the Law Court in their instructions on the subject in 1927. (126 Me. 622, Q3).

If he finds 10,000 *valid signatures are lacking that ends it*

It is plain that in the course of carrying out his duty, if the Governor finds that he must eliminate petitions and names which bring the total below ten thousand, it is unnecessary for him to inquire further. The burden of proof is on the petitioners to establish the validity of ten thousand signatures and as soon as the Governor is satisfied that there are less then ten thousand his duty is clear to refuse to submit the referendum. Here again it might look strange for the referendum to be refused if the petitioners lack but one or two of the necessary ten thousand, but many an election has turned on as small a margin as that. In a particular way the ten thousand signatures constitute an election; unless the ten thousand are obtained the election fails.

The Constitution outlines no further duty upon the Governor in cases where he has found the referendum petitions ineffective. No formal proclamation is required, and I find from newspaper files that in recent years the Governor who disallows a requested referendum has not proclaimed his findings in much detail. The Governor is fettered in his action on the referendum petitions by the strict wording of the Constitution as interpreted by the courts, but he has no duty to promulgate in detail the results which the law has often obliged him to reach.

New legislation

To suggest changes in the law is not within the necessary purport of this letter. Section 22 of the referendum amendment permits the Legislature to "enact further regulations not inconsistent with the Constitution for applying the people's veto and direct initiative." Up to the present time the Legislature has preferred not to supplement the Constitution with such legislation, but has left the officials, in accordance with the section which is quoted, to be "governed by the provisions of this Constitution or the general law."

Legislation in certain details might well be proper; for instance, a requirement that the Secretary of State make a permanent record of petitions submitted, and a requirement that proclamation be made and published in the public laws of the result of all requested referenda.

Other more substantial changes might aid in carrying out more effectively the purpose and content of the amendment. The interpretation which the Law Court has given to the Constitution as it stands without legislation, has, however, cast the administration of the amendment into a mould which it is doubtful if the Legislature has the authority to break or substantially alter. In so far as there is reasonable criticism of the manner in which the amendment under the existing rulings must be enforced, however, it is, of course, the privilege of the Legislature to consider and pass such legislation as may be constitutional. Beyond that the remedy, if any is needed, is for the people, who have it within their power to alter or amend the Constitution at any time. In this letter, I have, however, been concerned with the situation as it legally is and not with possible changes.

Very truly yours,

CLEMENT F. ROBINSON
Attorney General

GRAND JURY REPORTS—LEWISTON BALLOT FRAUDS

STATE OF MAINE

Androscoggin, ss.

AT THE SUPERIOR COURT, begun and holden at Auburn, within and for the County of Androscoggin, on the first Tuesday of October in the year of our Lord one thousand nine hundred and twenty-nine.

The Grand Jurors for said County, having been called together in special session for the purpose of inquiring into the count of ballots in the recent state referendum election in the City of Lewiston, have examined carefully into the circumstances and have had presented to them the testimony of a great many witnesses, including police officers in attendance while the count was in progress, wardens and ward officers present while the count was going on, certain bystanders and all persons who participated in the counting of the ballots Wards One to Six inclusive.

We respectfully report as follows:

Under the statutes and the law as they stand we are unable to find sufficient evidence to enable us to bring in any indictment against any persons of person for any acts in connection with this election and count of ballots.

We are, however, convinced that in several of the wards and particularly in Wards Three, Four and Five, the miscount on election night, which was proved by the recount to have been made, was so grossly inaccurate and incorrect that we can only conclude that there was wrongdoing on the part of some at least of the persons participating in the original count.

We are, however, blocked from bringing in an indictment partly because of the absence of definite proof as to the particular person or