PUBLIC DOCUMENTS

OF THE

STATE OF MAINE

BEING THE

REPORTS

OF THE VARIOUS

PUBLIC OFFICERS
DEPARTMENTS AND
INSTITUTIONS

FOR THE TWO YEARS

JULY 1, 1930 - JUNE 30, 1932

STATE OF MAINE

REPORT

OF THE

Attorney General

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for the calendar years

1931-1932

ifications of its own members. The duty of the Governor and Council is limited to canvassing the returns and determining the result of the balloting.

ELECTION LAWS—POWER OF GOVERNOR AND COUNCIL

November 8, 1932

To Hon. Wm. Tudor Gardiner
Governor of Maine

In accordance with your request I am summarizing the situation with reference to the recount of Congressional votes in the third district, in accordance with the views I have already expressed to you in recent conferences.

All the ballots forwarded to Augusta have now been recounted, and if the original returns from the various towns as tabulated by the Governor and Council on September 28th are corrected in accordance with this recount, the candidate whose election appeared on the original tabulation, Mr. Utterback, stands elected on this corrected tabulation with a very small variation in his plurality.

The question now before the Governor and Council is whether it should go further and inquire into the circumstances under which the ballots were cast.

The Council has discussed the possibility of asking the Law Court for its opinion. Whether this is the solemn occasion which the Constitution names as the reason for such an inquiry may be a question. If the interrogations should be put, the court's answer will settle it. In the meantime, the Council have not asked my opinion. You have, however, and I am frank to say that my answer is "No." I doubt if under any circumstances the Governor and Council have jurisdiction to inquire into the circumstances of the election of a member of Congress. Certainly there is no such jurisdiction in the case now presented for their consideration.

To show the basis for my conclusion let me summarize the documents which the parties have filed, and analyze the case thus presented in the light of the statutes and opinions of the Law Court.

* * * * *

Such being the allegations in the documents themselves, do they call for action? If we assume for the present that there is no question of the jurisdiction of the Governor and Council, do these documents adequately invoke it? My answer is "*No.*"

Should the ballots have been recounted?

First, as to a recount, which has already been completed; for the purpose of correcting the returns by the ballots themselves.

I am doubtful whether it was the duty of the Governor and Council to recount the ballots in all the precincts in the district merely on the

basis of the request filed. R. S. ch. 8, sec. 55, provides for an examination of the ballots:

> "Cast in said town and returned to the Secretary of State upon written application . . . . alleging that the return or record of the vote cast in any town does not correctly state the vote as actually cast in such town."

This addition was made some years ago to the statutes, in order to authorize the Governor and Council to go beyond the records made at the time of the election. The old law permitted the Governor and Council to correct the returns as sent in, in accordance with the record as made. This statute clearly gave them the power in certain instances to look at the ballots themselves,—but in what instances?

As far as representatives to Congress are concerned this section merely determines who is to receive the certificate which prima facie entitles the holder to participate in the organization of Congress, and to maintain his seat unless and until his right to hold the office has been passed on if a contest is made. Congress is the final judge of its own elections.

Moreover, this section by its terms in the case of representatives to Congress is limited to "the examination and correction of returns," while in the case of county officers it extends to "determining the election."

There may well be a doubt whether the statute intends that ballots for representative to Congress should be recounted at all, but if we assume that the statute vests the Governor and Council with this power, it is my opinion that definite reasons for the recount must be set forth, and the recount should only extend as far as these reasons obtain. That is, it seems to me that unless an inspection has developed substantial discrepancies which will affect the result of the election, the Governor and Council have no jurisdiction to recount the ballots. The statute contemplates that the candidates shall inspect the ballots, and get their ammunition in hand before they aim their guns., (R. S. ch. 8, sec. 49.)

An instance of a proper occasion for a recount is the recent recount of ballots cast in Knox county for county attorney. An inspection apparently disclosed sufficient errors to substitute the defeated candidate for the one apparently elected on the original tabulation. Both candidates joined in the request for a recount. Had the candidate defeated on the face of the original tabulation merely requested a recount of the precinct where the discrepancy was discovered, it then might well have been proper for the Governor and Council to recount all the ballots in the territory in order that no injustice might be done either party. In the first instance, however, there should be no recount of the original ballots unless a prima facia case has been made out on the basis of an inspection which justifies the petitioner in asking a recount because he can show that he has discovered enough discrepancies to overturn the result of the preliminary tabulation. This the

pleadings here do not definitely claim. They base the request for a recount not on an *inspection* which has given definite date for changing the election, but on a *suspicion* that an inspection *will* show it.

Method of recounting

Secondly, it seems to me that when a recount of the ballots has been ordered, the Governor and Council do not need to personally inspect and count every ballot cast. They should pass only on disputed and questionable cases. It seems to me that the Governor and Council should take the position which a court takes under similar circumstances; viz.: it notifies the contestants that it is up to them to agree upon the undisputed ballots on the basis of an inspection. The Governor and Council need only pass on the comparatively few cases in doubt. Such a procedure would have saved the state much money during the last few weeks, and would place the expense, in the first instance, at least, where it properly belongs, viz.: on the contestants. If thereafter justification should be found for refunding to them any of the expense incurred by them, such expense would be obviously considerably less than the expense which has been running up since the recount began.

Going behind the ballots on the basis of the documents filed

Taking the situation as it now stands, with the ballots recounted, the question before the Governor and Council is what action should be taken on Mr. Brewster's allegations of fraud, lack of secrecy, and irregularities. His position, as I understand it, is that it is the duty of the Governor and Council to investigate into these matters in order that the ballots forwarded to Augusta from certain precincts may be eliminated from the count in whole or in part. Whether or not he further takes the position that the Governor and Council should be itself an investigating body, or whether it is merely a tribunal to pass on facts produced by the contestants, is not clear.

It seems to me that the allegations in the documents filed with the Governor and Council, which I have summarized above, show no sufficient cause for the exercise of any jurisdiction that the Governor and Council may have. In other words, Mr. Brewster does not make out a case on the documents filed, which justifies the Governor and Council in going ahead.

* * * * *

In short, as far as fraud is concerned, and quite irrespective of the right, power and authority of the Governor and Council to sit as a tribunal in this matter, it is my opinion that the papers as filed fail to make out any case for action within the principles laid down in *Opinion of the Justices*, 124 Me. 453 (1924).

Unless and in so far as fraud is definitely and specifically alleged, the defending party may properly urge that he has nothing to answer, and that the tribunal has nothing to go ahead on. The tribunal may properly rule that it will not hear and pass on such general allegations.

As to the mandatory provisions regarding secret balloting, the situation is not much different. . . . .

The allegations, however, fall far short of the situation in St. Agatha described in the questions submitted to the court in 1924.

In addition to fraud and lack of secrecy, there is only one other ground set forth for throwing out the entire vote of any precinct or precincts, and this is the allegations with reference to the failure of certain plantation officials to carry out provisions of law. Assuming that such transgressions would require the Governor and Council to eliminate the vote of the plantation where they occurred, it is sufficient for our present purpose to say that the general allegations in this respect in the original paper are not supplemented by any further documents.

It is, therefore, my conclusion that on the documents as filed the Governor and Council should take the position that if they have any jurisdiction whatever to inquire into the circumstances under which ballots were cast, no sufficient occasion is here presented for the exercise of such jurisdiction.

Supplementing the documents that have been filed

Of course the Governor and Council do not want to act on mere technicalities. If the contestant has additional data that he can set forth, which will justify a consideration of his case on the merits, he can, of course, amend or supplement his pleadings, and he should. I doubt if he has, or can get, any such data.

In this respect this department has independent data for testing the situation. As you know, on the basis of complaints that reached me after the state election I arranged for an investigation of the facts. Some of Mr. Brewster's friends assisted me with information. The reports of the twenty investigators as summarized by the attorney in charge, Mr. Gould, do not indicate that there was any conspiracy or other felony. There are perhaps inferences of serious wrong-doing; but one cannot prosecute for inferences. Breaches of the election laws by town officials are not felonies, although city boards of registration are subject to grave penalties for certain breach of duty. From Mr. Brewster's petition and the statements of his counsel one can judge that he has ascertained the same facts, and arrived at the same conclusion as this department. There were plenty of irregularities, but no felonies.

The problem of the Attorney General in that investigation was, of course, different from the problem of the Governor and Council if they have jurisdiction of a contest for election to Congress. The inquiry of this department was into conspiracy or other serious crime. Finding none I stopped. A tribunal with jurisdiction ultimately to determine who was elected might inquire into and be ruled by lesser irregularities. I do not believe it is for the Governor and Council to consider these any more than it was for the Attorney General.

In saying this, however, I do not conceal my concern at certain conditions which apparently obtain in the precincts examined. These conditions, which have apparently been handed down from the past, should be corrected by public opinion wherever they exist, and perhaps by legislation. Two wrongs do not make a right. After the election it is, however, neither for the Governor and Council nor for the Attorney General to interfere with the result as shown by the ballots which were cast.

The jurisdiction of the Governor and Council

Believing as I do that Mr. Brewster cannot make out any stronger case than he has, and therefore that by no possibility can he produce a case which would require further action by the Governor and Council, I might stop here, but to decide a case on insufficiency of pleadings is unsatisfactory. The problem has been argued, and should be considered on its merits. Have the Governor and Council any jursidiction anyway? I say "No."

I believe that the Governor and Council have no jurisdiction whatever to examine into the circumstances of the balloting in this election. Whether under any conceivable circumstances the Governor and Council would have the right to go behind ballots forwarded to the state house I do not need to say. Conceivably, a case of such clear, undisputed fraud might be made out that it would be an absurd miscarriage of justice for the Governor and Council to accept and count the ballots forwarded to Augusta. No such case can exist here.

Opinion of Justices, 124 *Maine* 453

If we take it as a case of the registration and voting of persons not entitled to vote; of illegal assistance; and of absence of some of the protections extended to secure the secrecy of the ballot,—we not only have, as we have already seen, a case which falls far short of the doctrine in 124 Me. 453, but we have a case to which 124 Me. 453 does not apply, because that was a case under the primary election statute, and not a case under the election law.

The questions presented by the Governor in behalf of himself and the Council to the Law Court in the Brewster-Farrington contest were received by a court composed of eight judges. One judge did not sit. Of the others four gave an opinion which required the Governor and Council to rule out certain of the votes in Ward 4, Portland, and all the votes in St. Agatha. Three of the judges dissented. These three point out, as the counsel for Mr. Brewster concedes in the oral argument, that under previous election laws in Maine, and generally throughout the country, the Governor and Council are but a canvassing board to receive the returns and to recount, if the law permits, the ballots, and can go no further. These three judges then show that the primary election law varies in no respect from the election law. They argue that since the election law has always been so interpreted, the primary law should be.

The four judges giving a majority opinion do not discuss this general premise, viz.: that under previous decisions the Governor and Council would have no such power. They could not discuss it; it was clearly law, and was conceded by Mr. Brewster's counsel in the present case.

What these four judges do say is that fraud is abhorrent, and that the Governor and Council "are made by the legislature the tribunal to pass upon the results in primary elections." From this they infer the power to inquire into the circumstances under which the votes were cast in certain places.

To be sure, in answer to another question these judges declined to rule whether the decision of the Governor and Council would be final (page 483), but nevertheless it is in my opinion plain from the opinion of the majority that the two guiding reasons for their decision are that specific, definite fraud was alleged, and that should the fraud be successful and the candidate benefitted thereby be placed on the primary ballot, no effective way of protecting the rights of the other candidate could be secured. The ballots must be printed for the September election. Any remedy by mandamus or otherwise would either be impracticable or cause great public confusion. Therefore, as Chief Justice Cornish stated to Mr. Brewster "any other result" (than the course the majority took) "would be unthinkable."

In 116 Me. 579, the judges, in ruling on referendum petitions, commented on the significant fact that there is no tribunal other than the Governor to pass on them. Hence, says the court, the Governor can inquire into fraud. The court speaks of the legislature as the tribunal which passes ultimately on the election of its members, and which can inquire into the circumstances of their election. The implication is clear,—since Congress may, it alone can.

In other words, the four judges giving the majority opinion adopted an exceptional and extraordinary expedient, changing as far as the primary law is concerned, and only as far as the primary law is concerned, the existing principles of law with reference to elections. An exception should only extend to the circumstances which causes it to exist. Those circumstances do not apply under the general election law, and particularly in the case of a member of Congress whose election is determined by Congress itself.

To be sure, the question before the Governor and Council is whether or not they should issue a certificate, but the value of the certificate when issued may well be taken into consideration. It is not a certificate of election which makes the holder an officer for all purposes de jure. It merely sends him down to Washington with a prima facie right to his office.

The re-enactment of the election law in the Revision of 1930 of course re-enacts it with much interpretation as the courts have given it; and an opinion of the Justices is a binding interpretation. But, the point is,—the Justices did not interpret the election law,—they interpreted the primary law,—and identical words used in two statutes

may have a different legal meaning, according to the circumstances to which they apply. A primary election to nominate a candidate is one thing; the election of a representative in Congress quite another thing.

That the majority did not carry their own rulings to a logical conclusion in all respects is shown by the fact that they did not authorize the Governor and Council to throw out the ballots fraudulently cast for any candidate who had not, within the proper period, discovered the facts and taken the point. If fraud is so abhorrent that it should by no possibility achieve its object, the logical conclusion would be that upon Mr. Brewster's discovering the fraud which apparently seated Mr. Farrington, all other candidates affected by the same fraud should also benefit or lose by the discovery of the same facts. This, however, the court would not permit. In other words, fraud in balloting *to a certain extent, under certain circumstances*, can be inquired into by the Governor and Council, but it is my opinion that these circumstances probably never exist where the result of a general election is in issue, and certainly are not made out either on the papers filed in this case, or under any circumstances that are reasonably likely to be shown in the third district election for representative to Congress.

What the Law Court would say, if interrogated again, as the Council has considered doing, of course I do not know. But, as far as I am concerned, I have no doubts of the conclusions I have reached.

Conclusion

Finally, then, it is my belief that the recount of the third district Congressional election is now complete, and that the duty of the Governor and Council is comprised in correcting the preliminary tabulation on the basis of the recounted ballots, and announcing the result accordingly.

ELECTION LAWS—POWER OF GOVERNOR AND COUNCIL

November 28, 1932

To Hon. Wm. Tudor Gardiner
Governor of Maine

You inquire what, in my opinion, will be the eventual situation as far as the Governor and Council are concerned if there should be a deadlock on affirmative votes proposed with reference to the recount of ballots cast in the third district for member of Congress in the recent state election.

This recount is now going on for the purpose of correcting the returns in accordance with R. S. ch. 8, sec. 55, if these returns are found erroneous. The Governor and Council tabulated the original returns in September and determined that a certain candidate appeared to be elected. The recount was invoked by a candidate who appeared to be defeated by the returns as thus tabulated.