

MAINE STATE LEGISLATURE

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STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calendar years

1943--1944

November 10, 1944

Hon. Sumner Sewall, Governor of Maine

Under date of September 7th, the Secretary of State laid before me a letter from one Frank C. Creteau asking authority to use stickers to place the name of a candidate for county treasurer on the York County ballots, at the election to take place on September 11, 1944. I addressed a communication to the Secretary of State, briefly analyzing the statutes, and advised him that he had no authority to comply with Mr. Creteau's request.

This office is informed that at the election on the following Monday in the City of Biddeford a large number of voters carried with them to the booths certain stickers which had on them the words:

"For County Treasurer

ARMAND DUQUETTE, Biddeford"

Several hundred of these stickers were affixed to the ballots, some under the column headed by the designation of the Democratic Party, some under the column headed by the designation of the Republican Party. The ballots were apparently then marked in the customary fashion and deposited in the ballot boxes. This office has no evidence of any improper or unlawful conduct on the part of the officials at the election. The sole question before us, as I understand it, is whether these ballots are 1) wholly invalidated; 2) if not wholly invalidated, shall they be counted for the office of county treasurer?

I have procured from the City of Biddeford an attested copy of the warrant for the State election and I am enclosing said copy herewith. As the warrant shows, the inhabitants of the seven wards of Biddeford qualified to vote were notified and warned to appear at the several named polling places on the second Monday of September, the eleventh day of said month, 1944, at 9 o'clock in the forenoon, then and there to give their votes for "Governor, Representatives to Congress, State Senators, Register of Probate, Clerk of Courts, Sheriff, County Attorney, County Commissioner, Representatives to Legislature." The warrant was issued on the 28th day of August, 1944. On that same day, according to the constable's return, attested copies were posted in the several designated places throughout the city within each of the said seven wards. It will be noted that the warrant does not call for the casting of any votes for county treasurer.

As my opinion of September 7th to the Secretary of State (a copy of which is attached hereto) discloses, there was, I believed, no vacancy existing in the office of treasurer of York County at the time of the September election. A vacancy had occurred subsequent to the primaries, and the Governor had appointed an incumbent. The statute which provided for the filling of that vacancy, R. S. Chapter 16, Section 4, reads as follows:

"If a person so chosen declines to accept, or a vacancy occurs, the governor, with the advice and consent of the council, may appoint a suitable resident of the county who having accepted the trust, given bond, and been sworn, shall be treasurer until the first day of January following the next biennial election, at which election

a treasurer shall be chosen for the remainder of the term, if any; but in any event he shall hold office until another is chosen and qualified."

It is evident from the language of this statute that the legislature actually contemplated the possibility of a vacancy occurring under such circumstances that there should be an election to complete a term. The question presented to me was whether our statutes have any machinery by the use of which the name of a candidate could be placed on the ballot between the dates of September 7, when the matter was called to my attention, and September 11, the date of the election.

R. S. Chapter 8, Section 16, as amended by P. L. 1941, Chapter 127, contains the following language:

"Stickers shall not be counted unless used to fill a vacancy or correct an error in the printed ballot."

Was there an error in the printed ballot?

I searched the statutes in vain in an endeavor to find any authority for nominating a county treasurer after the date of the primaries. R. S. Chapter 7, Section 36, cannot apply to the instant case.

I considered the possibility that in the theory of the law an officer irregularly elected becomes the office-holder de facto and his acts are recognized as valid. The purpose of this is to make sure that governmental functions do not fail because of lack of an administrator. This theory did not need application in the instant case because there was no vacancy in that county. A person was occupying the position of county treasurer, who under the express provisions of the statute "shall hold office until another is chosen and qualified."

As a result of the above, I advised the Secretary of State that he could not authorize the affixing of stickers for the office of county treasurer.

We now have before us, not a theory, but an accomplished fact. Stickers have been used in the City of Biddeford on some 1,300 ballots. My conclusions are as follow:

- 1) The stickers, used in such large numbers, with no evidence whatsoever of any fraudulent intent, cannot be regarded as distinguishing marks. The ballots in themselves were properly counted.
- 2) The warrant for the election did not provide that any votes should be cast for the office of county treasurer. There was no vacancy in that office that needed to be filled by irregular procedure. Therefore the votes for the office of county treasurer appearing on the ballots in the City of Biddeford must be wholly disregarded. The same thing applies to any other cases in the County of York, where the same procedure was followed.

3) In the Town of Sanford, a few ballots were marked with stickers containing the following language:

"For York County Treasurer
FRANK C. CRETEAU, Sanford."

Any evidence I have indicates that the same procedure was followed there as in the City of Biddeford. There is no evidence of any fraudu-

lent conduct in connection with the affixing of the stickers in the Town of Sanford. I am informed that there were only a few of these stickers affixed in that town and, if there were evidence of fraud, we would be justified in regarding them as distinguishing marks on the ballots sufficiently patent to justify throwing out all ballots so marked. However, since the same procedure was followed in Sanford as in Biddeford and we have nothing to suggest that there was an intent to place a distinguishing mark on the ballots, the Sanford ballots should be treated in the same way as the Biddeford ballots. Disregard the sticker votes for county treasurer; but count the votes on which the stickers appears (unless there is some other reason for throwing out the entire ballot) for those offices mentioned in the warrant for the State election as set forth above.

FRANK I. COWAN
Attorney-General

November 2, 1944

H. C. Crawford, Municipal Auditor

Audit

Imposition of probation for payment of fines and costs

With reference to your memorandum of Nov. 2nd on the above subject, the answers which follow herewith are applicable to the hypothetical cases 1 and 2 since the breach, or violation, of the probation in either case must occur within the period of time fixed for the payment of the fine and costs.

- (1) Where the breach occurs within the probation period, the offender may be brought before the Court for the revocation of the probation and the imposition of the original sentence even though the period of probation has expired. The important event is the violation within the probation period.
- (2) Where a sentence is imposed of a fine and costs, and the respondent is put on probation and time is fixed for the payment of the fine and costs, the condition is imposed on the respondent and it is he who must fulfill the terms of the probation. The probation officer does not act as a collecting agent for the county or the state. Thus, he has no obligation so far as the collection of the fine and costs is concerned except to receive it if it is paid to him, and to turn it into the treasury of the county in accordance with R. S. c. 147, §13, amended 1943, c. 269. When a person is sentenced to pay a fine and costs and he is committed in default of the payment thereof, §48 of said chapter provides that if he is unable to pay the same, he may be liberated by the sheriff after 30 days by giving his note for the amount due to the treasurer of the same county. Thus, the duty of a probation officer would be, on failure by the offender to pay the fine and costs, to bring him before the Court so that he may be committed and held in accordance with said section. Under this section, payment of the fine and costs at any time by the offender would entitle him to liberation.
- (3) In view of what I have stated in the preceding paragraph, I can see no reason why the probation officer would not be justified in accepting the payment of the fine and costs, after the time fixed