

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

FIFTY-EIGHTH LEGISLATURE.

HOUSE.

No. 159.

STATE OF MAINE.

Resolve requiring the opinion of the Justices of the Supreme
Judicial Court.

Resolved, That the opinion of the Justices of the Supreme
Judicial Court be required as to the constitutionality of Sec-
tion 1, Chapter 67 of the laws of 1878, and whether or not
the Justices of our Supreme Court can legally appoint Com-
missioners clothed with judicial powers, as provided in said
chapter and section.

IN HOUSE OF REPRESENTATIVES, }
January 22, 1879. }

Read and passed.

B. L. STAPLES, *Clerk*.

A true copy. Attest: B. L. STAPLES, *Clerk*.

BANGOR, Feb. 10, 1879.

The undersigned, Justices of the Supreme Judicial Court, have the honor to submit the following answer to the interrogatory proposed :

By the act of 1878, chapter 67, section 1, this Court is authorized, in certain cases, to appoint commissioners to hear upon due notice the disclosures of poor debtors, and to act thereupon in accordance with the subsequent provisions of the statute.

The question proposed relates to the constitutionality of the act authorizing the appointment of such commissioners.

The act of 1878 pre-supposes the rendition of judgment against the debtor disclosing, and that an execution has issued thereon. The hearing of a poor debtor's disclosure is not the trial of a cause. It is a procedure subsequent thereto in its nature. The trial has been had. Judgment has been rendered. The Commissioner is an officer of the Court, whose appointment rests on legislative authority. Execution having issued, by the procedure authorized by the statute, it is referred to a commissioner by whom a willing or unwilling debtor may be compelled to disclose the state of his affairs, with the power to adjudge such debtor in contempt in case of his refusal to answer.

To be sure, a commissioner has a judgment to exercise in the matter, but that does not make him a judicial officer. An auditor hears evidence, determines as to its force and effect, and reports his conclusions, which are made evidence to be submitted to a jury. The auditor is appointed by the Court. He hears a case provisionally, but he is not a judicial officer within the provision of Article 6 of the Constitution of Maine. Neither is a commissioner a judicial officer, nor is a hearing by him a hearing by any court within the provision of the Constitution. He is an officer whose aid is rendered to enable the creditor to obtain the fruits of his judgment.

An appraiser of real estate taken on execution exercises, or should exercise judgment in the appraisal of the real estate levied upon by the execution creditor, but that does not make him a judicial officer. Indeed, all men exercising political functions, have *quasi* judicial duties to discharge, but they are not therefore to be deemed judicial officers.

The appointment by the court of commissioners to hear the disclosure of poor debtors arrested on mesne process, was first authorized in 1835, by chapter 195, section 6, and the provisions of that act have been retained in all the subsequent revisions of the statutes to the present time.

The act of 1878 confers upon the Court the authority to appoint commissioners in other and additional cases. The principle underlying is the same. Whether the Court can appoint a commissioner to hear a particular disclosure or disclosures generally, whether the disclosure be of one arrested on mesne process, or of one against whom execution has issued, matters not at all as to the principle involved. In all these cases the commissioner is simply an officer of the court, appointed by legislative authority, acting in accordance with the powers conferred, but in no constitutional sense can he be regarded as a judicial officer.

We answer, therefore, that the act of 1878, chapter 67, section 1, is constitutional, and that the commissioners under its provisions are not clothed with judicial power within the meaning of Article 6 of the Constitution.

JOHN APPLETON,
C. W. WALTON,
CHARLES DANFORTH,
JOHN A. PETERS,
ARTEMAS LIBBEY.

HON. MR. FRANK, Speaker House of Representatives.

The undersigned, Justices of the Supreme Judicial Court, having considered the resolve passed by the Honorable House of Representatives on the twenty-second ultimo, respectfully submit the following answer :

We are of the opinion that, while the statute of 1878, chapter 67, confers certain judicial powers upon the commissioners to be appointed by the supreme judicial court under the provisions of the first section of the act, the essential characteristic of their office is ministerial, designed to aid in the enforcement of the judgment of the court, and clothed only with such incidental judicial authority as may be necessary to enable the creditor to obtain information as to the state of the debtor's property. The object of the proceeding before them is not to obtain an adjudication from the commissioners, but a disclosure from the debtor and from others who may know the condition of his affairs.

The judicial powers requisite to effect this purpose are conferred ; but when the disclosure has been completed, the property disclosed, in the absence of any agreement between the parties, is to be disposed of in the main, not by the order of the commissioners, but under the operation of general rules of law.

The instances are numerous of officers, not regarded as judicial, who still exercise certain judicial powers incidental to the main business and purpose which characterize the duties of their appointments. Perhaps the most striking illustration is that of county commissioners, who are not considered judicial officers, although the board—perhaps on account of its former appellation of "court of sessions,"—is often styled a court, and incidentally performs the function of a judicial body. They are sworn officers, and their tenure of office fixed by the statute. They hold regular sessions, have a clerk, and keep a record of their proceedings. R. S., c. 78, § 6 and 7. They render judgments, award damages and costs and issue warrants of distress therefor ; c. 18, § 3, c. 78, § 15,

c. 84, § 23. They may summon trial justices before them, issue writs of *capias* for non-appearance, and compel payment of the expenses thus incurred; c. 136, §§ 8 and 9. And still they are not appointed by the executive, because they are not deemed "judicial officers," within the spirit and intent of Art. v, § 8, of the constitution. *Morrison v. McDonald*, 21 Me. 555. *Rutland v. Co. Com.*, 20 Pick. 71, 78, 79. *Strong, pet'r*, 20 Pick. 484, 490.

It was the opinion of the Supreme Judicial Court (as expressed in *Morrison v. McDonald*, *supra*) in 1842, that, in the sense contemplated in the constitution, judicial officers were only those "who to a general intent and purpose were such, and not those who were incidentally and occasionally entrusted with the exercise of some attribute of a judicial character." And although the recorder of the municipal court of the city of Bangor, by the provisions of the city charter, was authorized to act in the place of the judge in his absence, in all criminal offences, and had the judicial power to try, judge and punish, the court held that, he was not a "judicial officer" in the sense contemplated by the constitution.

In view of the rule that no act, passed under the proper forms of legislation, can be judicially declared invalid, as exceeding the powers of the legislature, unless it appears manifestly repugnant to the express provisions or the established principles of the constitution, we concur in answering that, it is not the duty of the judicial department to declare the first section of the act referred to unconstitutional, and that commissioners may be legally appointed as therein provided.

WM. WIRT VIRGIN,
JOSEPH W. SYMONDS.

BRUNSWICK, February 15, 1879.

To the House of Representatives in Legislature assembled:

Not being able to concur in the foregoing answer returned by the Chief Justice and my associates to your interrogatory, my duty to them, to myself, and to you, seems to require that I should state my reasons.

It is quite true that a man may be appointed in pursuance of legislative acts to perform certain *quasi* judicial duties in particular cases without being a judicial officer. But it seems to me that the commissioners appointed under chapter 67 of the laws of 1878 must be regarded as judicial officers—because, by § 1, they are to “be sworn and hold office,” during an indefinite time, performing judicial duties assigned to them by subsequent sections, in all cases that may arise within the scope of their jurisdiction; by §§ 4 and 10 they are empowered to compel the attendance of parties, debtors and others, by issuing subpoenas “to be served by officers qualified to serve civil process,” and “served as other subpoenas are served;” by § 11, to issue writs of *capias* to bring before them debtors and other persons who do not appear in response to their subpoenas, and to fine and commit them to jail for non-payment of fine; by § 12, to adjudge debtors and other persons to be in contempt, and to issue warrants for their commitment to jail until they purge themselves of such contempt by compliance, or be otherwise discharged by due process of law; and by § 6 to perform substantially all the duties that have been heretofore assigned to Justices of the Peace and Quorum sitting to hear the disclosures of debtors upon mesne process or execution. Such justices were held in *Cordis v. Sager*, 14 Maine, 475, “to constitute a court” and to be “clothed with jurisdiction,” and their proceedings may be revised and reversed by the Supreme Court on *certiorari* like those of other inferior tribunals not proceeding according to the course of the common law. *Little v. Cochran*, 24 Maine, 509.

It seems to me that the commissioners appointed under the act we are considering, would be liable to be harrassed with suits to test the correctness of their doings by those whose rights and liberties are affected by them, unless they are entitled to the immunity which belongs to judicial officers acting within the scope of their jurisdiction. Nor can I think that any of the cases presented as analogous are so. An auditor's report binds nobody until it is accepted by the court appointing him, before which court its correctness may be tested by those whom it affects unfavorably. Moreover he is the appointed servant of the court in a single case and has no general jurisdiction of all similar cases hereafter to arise as these commissioners have. So it is with a Master in Chancery. Neither of these, though specially assigned to assist the court by the performance of certain quasi judicial duties, should be regarded as holding a judicial office. They act only in the particular cases for which they are appointed or agreed upon, and their doings are directly and immediately supervised by the court for which they act. An appraiser of real estate taken on execution is appointed by authority of law for the single service only, and so, clearly, is not to be regarded as holding a judicial office, though performing quasi judicial duties. But his doings are largely subject to the option of the parties concerned. The debtor may redeem if the appraisal is too low. The creditor may reject the levy if it is too high. *Bingham v. Smith*, 64 Maine, 450.

The commissioner appointed under chapter 195, laws of 1835, was the mere servant of the justice, judge or court appointing him, to receive the disclosure—not of poor debtors arrested upon mesne process, but of any one who had been served with process in any other manner than by arrest, who desired to disclose the state of his affairs before judgment, so that execution might not run against his body; and the justice, judge or court, before whom the process was returnable, was to adjudge whether it should or should not so run, upon an examination of the disclosure so taken. The commissioner does not seem to have had even a quasi judicial

duty to perform, until the enactment of chapter 148, §§ 10 and 11, revised statutes of 1841; and then and ever since their powers have been confined to cases where the debtor volunteered to disclose, and, upon his application, to the issuing of a notice to the creditor upon which the creditor might appear or not as he saw fit—the whole proceeding being designed for the relief of such poor debtors as desired to avail themselves of it.

Neither debtor nor creditor can be compelled to appear before a commissioner who may be appointed by the court under R. S., Chap. 113, §§ 8 and 46; and herein it seems to me there is a radical difference in principle between commissioners so appointed as the servants of the court in the several particular cases which they are authorized to hear and those who may be appointed under chapter 67, laws of 1878, upon whom is conferred by that statute general power and authority over all cases of that description, and a jurisdiction to be exercised *in invitum*, with no supervision except that which the Supreme Court has over all inferior tribunals.

I think commissioners under the law of 1878 are judicial officers, holding office for an indefinite term of time, exercising some of the most important and delicate functions and powers that any court can exercise, under an act which gives them jurisdiction *in invitos*, in all cases arising within the scope of their powers, and that they are in no sense the servants of a court to whom they make no report or return whatever.

In brief, these are the reasons which induce me to believe that the Supreme Court cannot, without a violation of Article V, Part I, Section 8, of the State constitution, appoint commissioners under chapter 67, laws of 1878. And I must answer the question propounded by the House accordingly.

WILLIAM G. BARROWS.

STATE OF MAINE.

IN HOUSE OF REPRESENTATIVES, }
February 24, 1879. }

Ordered to be printed, on motion of Mr. JONES of Lewiston.

B. L. STAPLES, *Clerk.*