

MAINE STATE LEGISLATURE

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DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE,

DURING THE SESSION

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Sixty-Fifth Legislature.

SENATE.

No. 239.

STATE OF MAINE.

To the Chairman of the Committee on Public Buildings :

In accordance with the instruction of your committee to me, to inquire into the legality of the expenditures of the Commission created by the laws of 1889, to supervise the enlargement of the State House, I have performed that duty, and herewith submit my report :

The report of the Commission to the legislature would, upon its face, indicate an overdraft of the appropriation for the enlargement of the State House, but upon investigation I find as a matter of fact that the Commission did not overdraw the appropriation, and that the apparent overdraft results from the expenditure from the contingent fund and the appropriation for furniture and repairs, said overdraft being expended principally for the boiler house and furnishing the house of representatives.

This leaves but two questions for consideration: First, did the Commission have a legal right, under the clause in the resolve which says "and for the reasonable expenses of the Commission," to take salaries? Whether the expenses were "reasonable," that is, too high or too low, is a question of fact, not of law, which I am not required to discuss. The question then arises: Is the phrase "reasonable expenses," or so far as the law is involved the term "expenses," as used in the resolve, limited merely to the money actually paid out by the Commission, or is it broad enough to cover the salaries of commissioners? I think it covers both.

This is undoubtedly the construction the two able lawyers on the Commission put upon the resolve, and probably without any examination of the authorities, but on the generally accepted principle that neither states nor individuals expect to receive the benefit of a valuable service without due compensation therefor. In the absence of any authority to the contrary, this proposition might properly be left with the construction placed upon it by the lawyers on the Commission, on the ground that in the absence of such authority the opinion of the lawyers in the Commission is as good as the opinion of equally good lawyers off. But there is both authority and precedent for the action of the Commission in taking salaries.

Volume 4, Opinions of the Attorneys General of the United States, page 577, Nathan Clifford, Attorney General, says: "Under an act of March 3d, 1847, the warrant to which my attention has been drawn declares that the sum of \$6,000 is appropriated to defray the expenses of the Commission now sitting under the treaty between the United States and the Cherokee Indians, and the fact that the money is placed at the discretion of the President. The first act under which that Commission sat appropriated a certain sum for compensation to two commissioners and pay of secretary and for contingent expenses. The word 'contingent' is dropped in the act of 1847, and the language is 'that the sum of \$6,000 be, and the same is hereby appropriated out of any money in

the treasury, not otherwise appropriated, placed at the discretion of the President, to defray the expenses of the Commission now sitting under the treaty,' etc. The words are general, to pay the expenses of the Commission, and must be understood to include the salaries of the board, as well as incidental expenses. When Congress appropriates a sum to pay the salary of an officer and expenses, they must mean those expenses which are necessarily incident to the work to be done, and where a duty is placed upon an officer, the performance of which necessarily involves travel, clerk hire, office rent, etc., a broad provision for expenses will include the cost of such travel, clerk hire, office rent, etc.," 22 Court of Claims, 269-277, Dunwoody's Case.

Salary and compensation for services are expenses.

During the entire administrations of Washington, John Adams, Thomas Jefferson and the first term of Madison, sometimes by special act and sometimes in the general appropriation acts, the provisions for the diplomatic corps consisted of so much money "for the expenses of foreign intercourse" to be expended in the discretion of the President. Under these acts, the President fixed the salaries of all our foreign ministers, consuls and envoys, and these salaries were paid out of the sums thus appropriated, 7 Attorneys Gen. Opinion, 186. Ambassadors and other public ministers of the United States. William L. Marcy, Secretary State, Caleb Cushing, Attorney General. In *Byers vs. U. S.*, 22, Court of Claims, 125, the court, (Davis, Judge,) refers to this opinion in defining the term expenses and says "during the whole of Jefferson's term and part of the terms of other early presidents, Congress annually appropriated a sum in gross for the expenses of intercourse with foreign nations, leaving it to the executive to fix the salaries of its several appointees.

In *Dixon vs. Bell*, 1st Starkey, N. P. C., 287, in a case involving the services of a physician in an allegation that the plaintiff had been put to great expense for medicines, etc., the Court says, the word "expense" does not necessarily mean expense of money, for "expense of his moneys" is a phrase

well known to the law, and if the plaintiff had been a solicitor and had spent his time in personally investigating the title, he might have truly alleged that he had been put to expense. There are numerous other decisions which show that when money is appropriated" to pay expenses it must mean those expenses which are necessarily incident to the work to be done."

I deem these citations sufficient to establish the legal proposition that the Commission had a right to pay themselves salaries under the resolve of 1889.

The second question involved in connection with this report is, whether the Governor of the State could legally take compensation for his services as a member of the Commission, even admitting that the other members of the Commission could legally do so.

No objection can be based on section 6, article 4 of the Constitution which says, "the Governor shall at stated times receive for his services a compensation, which shall not be increased or diminished during his continuance in office." Receive for his services" as what? As Attorney General? No. As Secretary of State? No. Simply and solely for his services as Governor. This section, then, can have reference to no other office or employment.

He received as Commissioner no addition to his salary as Governor. In *Lowe vs. Brackett*, 47, Cal. 364, the Court say in regard to the right of the Attorney General to receive compensation for services as examiner, in addition to his salary, under a constitutional provision in substance like ours, that "after having thus performed his service which under the Constitution is wholly foreign to his office and which is not and cannot become a part of his official duty as Atty. General, and if the legislature has seen fit to compensate him for this unofficial service there is no constitutional impediment to hinder them from so doing." Article 5, Part first, Sect. 5 of the Constitution reads, "No person holding any office or place under the United States, this State, or any other power, shall exercise the office of Governor."

Was a position on the Commission under the resolve of 1889, an "office or place" within the meaning of the Constitution? I think not.

It is obvious that office and place are used in the Constitution as synonymous terms, and apply to a constitutional office. Art. 9, Sec. 1 of the Constitution reads "Every person elected or appointed to either of the places or offices provided in this Constitution, etc.," which very clearly confirms the above interpretation.

In *Brown vs. The People* 45 Ill. 397 the Court say. The only question presented by the record is this.

Are the commissioners appointed by the Act of Feb. 25, 1867 entitled "An Act to provide for the erection of a new State House" officers within the meaning the 2 sect. of the 4th Art. of the 23 Sect. of the 5th Art. of the Constitution of the State.

After making a distinction between an office and employment and that the commission came under the latter, the Court further says. No tenure of office is fixed by the act, no permanency is attached to it, nor is there the slightest connection with the exercise of any portion of the Executive power, and no intention manifested in the act itself to establish an office. The appointees are to perform a duty single in itself which the legislature could not of and by itself perform, that is, to superintend the erection of a State House and disburse moneys the legislature may appropriate to such purpose. No power is given to levy taxes and no government act is to be performed by them. It is only by the advance of civilization and refinement that costly edifices are erected for worship or legislation. Government can be administered without such structures, and an agent who superintends their erection cannot with any propriety be said to perform a function of government.

There are numerous decisions which make the distinction between an office and an employment.

Land Agent not an officer but an employee, 3rd Maine, 481.

Liquor Agent same, 67, Me., 63.

An officer for service rendered in his official character can charge nothing in excess of his salary, but for services performed in his individual capacity he is on equal footing with other individuals. See *Harris & Gill*, Md. 57th p. Same principal cited and confirmed 60th Md., 309. *State vs. Weston*, 4th Neb., 234. Secretary of State acting as Adjutant General held he was entitled to compensation therefor as well as salary of Secretary of State. In *Crossman vs. Nightingill*, in 1st Nev., 323, the Lieut. Gov. was made *ex officio* warden of the States Prison by the legislature. Held he was entitled to pay for services as warden in addition to salary as Lieut. Gov.

It seems to me very clear from the numerous authorities on the subject that a position on the State House Commission was an employment and not an office, and that the Governor in serving thereon was in no way acting within the scope of his office as Governor, and that he was clearly entitled to compensation for his services.

In conclusion I will cite one more precedent which I think will, by implication, be conclusive of the whole question at issue.

Article VI, section 2 of the Constitution reads, "The justices of the Supreme Judicial Court shall, at stated times receive a compensation, which shall not be diminished during their continuance in office, but they shall receive no other fee or reward." Section 6 reads, "The justices of the Supreme Judicial Court shall hold no office under the United States, nor any state, nor any other office under this State, except that of justice of the peace."

It will not be questioned that these two sections as closely confine a justice of the Superior Court within the lines of his office as the sections before cited confine the Governor within the lines of his.

Still under these restrictions Chief Justice Appleton, on the twenty-ninth of December, 1876, received from the State \$250, under a resolve approved February 24, 1875, appointing him to arrange the Constitution as amended, under appro-

priate titles, etc. It is worthy of notice in this connection that the Chief Justice suggested the propriety of payment for his services. In a letter to the Secretary of State, dated September 18, 1876, he says:—"Whatever the Honorable Council shall deem a suitable and sufficient compensation will be entirely satisfactory to me.

I think this case furnishes a strong and, in the absence of direct authority to the contrary, conclusive precedent in establishing the constitutional right of the Governor to perform any service in an employment which does not fall within his official duties, and receive compensation therefor.

Respectfully submitted,

A. M. SPEAR.

REPORT OF COMMITTEE.

The Committee on Public Buildings, to which was referred the report of the Commission upon the enlargement of the State House, have had the same under consideration and ask leave to report as follows:

First—They referred the legal questions involved in the report of the Commission to Senator Spear, as a sub-committee whose opinion has been adopted as the report of the committee, and is submitted herewith.

Second—They recommend that the said report be accepted and placed on file in the office of the Secretary of State.

ADAMS, *for the Committee.*

STATE OF MAINE.

IN SENATE, March 23, 1891.

On motion by Mr. ADAMS of York, laid on table to be printed.

KENDALL M. DUNBAR, *Secretary.*