SEVENTY-FOURTH LEGISLATURE

SENATE. No. 1

STATE OF MAINE.

IN SENATE, March 27, 1907.

Ordered that the Justices of the Supreme Judicial Court are hereby requested to give to the Senate, according to the provisions of the Constitution in this behalf, their opinion on the following questions, to wit:

In order to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving and maintaining the natural water supply of the springs, streams, ponds and lakes and of the land, and by preventing or diminishing injurious erosion of the land and the filling up of the rivers, ponds and lakes, and as an efficient means necessary to this end, has the legislature power under the Constitution,

1. By public general law to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof without compensation therefor to such owner;

2. To prohibit, restrict or regulate the wanton, wasteful or unnecessary cutting or destruction of small trees growing on

any wild or uncultivated land by the owner thereof, without compensation therefor to such owner, in case such small trees are of equal or greater actual value standing and remaining for their future growth than for immediate cutting, and such trees are not intended or sought to be cut for the purpose of clearing and improving such land for use or occupation in agriculture, mining, quarrying, manufacturing or business or for pleasure purposes or for a building site; or

3. In such manner to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated lands by the owners thereof as to preserve or enhance the value of such lands and trees thereon and protect and promote the interests of such owners and the common welfare of the people?

4. Is such regulation of the control, management or use of private property a taking thereof for public uses for which compensation must be made?

To the President of the Senate:

The undersigned Justices, in obedience to the requirement of the Constitution, severally give the following as their advisory opinion upon the questions of law submitted to the Justices of the Supreme Judicial Court by the Senate Order of March 27, 1907:

We find that the legislature has by the Constitution "full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this Constitution nor that of the United States." Const. of Maine, Art. IV, Part III, sec. 1. It is for the legislature to determine from time to time the occasion and what laws and regulations are necessary or expedient for the defence and benefit of the people; and however inconvenienced, restricted or even damaged particular persons and corporations may be, such general laws and regulations are to be held valid unless there can be pointed out some provision in the State or

United States Constitution which clearly prohibits them. These we understand to be universally accepted principles of constitutional law.

As to the proposed laws and regulations named in the Senate Order, the only provision of the United States Constitution having any possible application to such legislation by a State would seem to be that in the XIVth Amendment. As to that provision, we think it sufficient to quote the language of the United States Supreme Court in *Barbier* v. *Connolly*, 113 U. S. 27, where, speaking of the XIVth Amendment, the court said: "But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of a State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of its people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." It may be added that the proposed laws and regulations would not discriminate between persons or corporations but only between things and situations, with a classification not merely arbitrary but based on real differences in the nature, situation and condition of things.

We think the only provisions in the State Constitution that could be reasonably invoked against the proposed laws and regulations are the guaranteed right of "acquiring, possessing and defending property," and the provision that "Private property shall not be taken for public uses without just compensation." (Dec. of Rights, secs. 1 and 21). If, however, the proposed legislation would not conflict with the latter provision, it evidently would not with the former; hence only the latter one need be considered.

The question of what constitutes a "taking" of private property in the constitutional sense of the term has been much considered and variously decided. In the earlier cases and in the older States the provision has been construed strictly. In some States in later cases it has been construed more widely to

include legislation formerly not considered within the provision. Still more recently, however, the tendency seems to be back to the principles enunciated in the earlier cases. In Massachusetts, one of the earliest States to adopt the constitution provision, and in Maine, adopting the same provision in succession, the courts have uniformly considered that it was to be construed strictly as against the police power of the legislature.

Commonwealth v. *Tewksbury*, 11 Met. 55, decided in 1846, was a case where the legislature prohibited the owners from removing "any stones, gravel or sand" from their beaches in Chelsea as necessary for the protection of Boston Harbor. The court held that the statute did not operate to "take" property within the meaning of the Constitution, but was "a just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with or injurious to the rights of the public." *Commonwalth* v. *Alger*, 7 Cush. 53, decided in 1851, was a case where the defendant was prohibited by statute from erecting and maintaining a wharf on his own land (flats) beyond certain fixed lines. The court held that the defendant's title to the land (flats) was a fee simple, and that but for the statute he would have had full right to erect and maintain wharves upon any part of it where they would not obstruct navigation. It was not claimed that the proposed wharf would obstruct navigation, but rather admitted that it would not. The court further held, however, that the statute was within the legislative power and not forbidden by any clause in the Constitution. The question was considered at length in an opinion by Chief Justice Shaw, and the principle stated as follows, viz: (p. 84).

"We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their prop-

erty, nor injurious to the rights of the community. All property in this Commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government and held subject to those general regulations which are necessary for the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from right of eminent domain," etc.

In the case *Wadleigh* v. *Gilman,* 12 Maine, 403, decided in 1835, only fifteen years after the adoption of our Constitution, there was upon the plaintiff's land a wooden building. A city ordinance was passed by legislative authority prohibiting the erection of wooden buildings within certain limits which included the plaintiff's building. After the passage of the ordinance the plaintiff moved his building to another place within the same inhibited limits. The defendant as City Marshal, acting under the ordinance, entered upon the plaintiff's land and took the building down. The court held the ordinance valid and the defendant protected, and declared as follows, p. 405: "Police regulations may forbid such a use and such modifications of private property as would prove injurious to the citizens generally. This is one of the benefits which men derive from associating in communities. It may sometimes occasion inconvenience to an individual, but he has compensation in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power without impairing any constitutional provision. It does not appropriate private property to public uses, but merely regulates its enjoyment." In *Cushman* v. *Smith,* 34 Me. 247, decided fifteen years later, in an elaborate opinion by Chief Justice Shepley, the court said of the constitutional provision in question (p.

258): "The design appears to have been simply to declare that private property shall not be changed to public property, nor transferred from the owners to others for public use without just compensation." In *Jordan* v. *Woodard,* 40 Me. 317, it was said by the court at p. 324: "Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain and well defined rights to that use secured, as the right to use the public highway, the turnpike, the ferry, the railroad and the like." The same doctrine was recognized in *Preston* v. *Drew,* 33 Me. 558; *State* v. *Gurney,* 37 Me. 156; *Boston and Maine R. R. Co.* v. *County Commissioners,* 79 Me. 386; and as late as 1905 in *State* v. *Robb,* 100 Me. 180.

There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land; 1st, such property is not the result of productive labor, but is derived solely from the State itself, the original owner; 2d, the amount of land being incapable of increase, if the owners of large tracts can waste them at will without State restriction, the State and its people may be helplessly impoverished and one great purpose of government defeated.

Regarding the questions submitted, in the light of the doctrine above stated, (being that of Maine and Massachusetts at least) we do not think the proposed legislation would operate to "take" private property within the inhibition of the Constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product and increase, untouched and without diminution of title, estate or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay but not deprivation. While the use might be restricted, it would not be appropriated or "taken."

In the following cases, restrictive statutes for the protection of property and other material interests of the people were held to be within the police power, and not a taking of private property, viz: Limiting the height of buildings though the owner owns usque ad coelum. *Welch* v. *Swazey,* 193 Mass. 364. Prohibiting the erection of wooden buildings within specified limits, *Wadleigh* v. *Gilman,* 12 Me. 403. Even when the owner had begun to erect the building before the statute was enacted. *Salem* v. *Maynes,* 123 Mass. 372. Authorizing the destruction of buildings without compensation to prevent the speed of a conflagration. *Am. Print Works* v. *Lawrence,* 23 N. J. L. 9. Prohibiting the further use of buildings and appliances for brewing purposes although they had been erected and fitted for that purpose when brewing was a lawful business. *Nugler* v. *Kansas City,* 123 U. S. 123. Prohibiting the erection of fences on one's own land to gratify spite against others. *Karasek* v. *Peier,* (Wash.) 50 L. R. A. 345. *Smith* v. *Morse,* 148 Mass. 407. Prohibiting the wasteful burning of natural gas by the owner. *Townsend* v. *State* (Ind.) 37 L. R. A. 294. Prohibiting the use of artificial means by the owners of gas wells to increase the natural flow of the gas from them. *Manufacturer's Gas Co.* v. *Indiana Natural Gas Co.* 155 Ind. 467, 50 L. R. A. 768. Authorizing dams for the purpose of reclaiming swamp lands where the effect was to oblige land owners to construct and maintain dikes to protect their lands from the water raised. *Margingault* v. *Springs,* 199 U. S. 473. Prohibiting one from allowing weeds to grow on his own land. *St. Louis* v. *Gault,* 179 Mo. 8, 63 L. R. A. 778. Limiting the quantity of land any person or family may cultivate within city limits. *Summerville* v. *Presley,* 33 S. C. 56. Prohibiting the flow of water from a private artesian well except for certain specified beneficial purposes, as irrigation or domestic use. *Ex parte Elam,* Cal. 91 Pac. Rep. 811. In *Windsor* v. *State* (Md.) 64 At. Rep. 288, a statute restricted owners of private oyster beds in taking oysters from them. It was held constitutional

and not a taking of private property. The Court, quoting from Judge Story, said: "Property of every kind is held subject to those regulations which are necessary for the common good and general welfare. And the legislature has the power to define the mode and manner in which one may use his property."

The foregoing considerations lead us to the opinion at present that the proposed legislation for the purpose and with the limitations named in the Senate Order, would be within the legislative power and would not operate as a taking of private property for which compensation must be made.

Respectfully submitted,

March 10, 1908.

LUCILIUS A. EMERY,
WM. P. WHITEHOUSE,
S. C. STROUT,
HENRY C. PEABODY,
ALBERT M. SPEAR,
LESLIE C. CORNISH.

MEMORANDUM.

Mr. Justice Woodard, one of the Justices of the Court when the Senate Order was passed, died before the foregoing opinion could be prepared. His successor, Mr. Justice King, was not appointed for several months after the passage of the Senate Order and holds that, therefore, the Senate has not required any opinion from him.

LUCILIUS A. EMERY.

To the Honorable Senate of Seventy-First Legislature:

By an order of the Senate passed March 27, 1907, the Justices of the Supreme Judicial Court were requested to give to the Senate their opinion on certain questions, involving the power of the legislature, under the Constitution, to prohibit, regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof without compensation therefor to the owner, in order, as an efficient means necessary to the end, to promote the common welfare of the people of Maine by preventing or diminishing injurious droughts and freshets, and by protecting, preserving and maintaining the natural water supply of the springs, streams, ponds and lakes and of the land, and by preventing or diminishing injurious erosion of the land, and the filling up of the rivers, ponds and lakes. The Seventy-first Legislature adjourned finally on the following day, March 28, 1907, and the order was received by me April 6, 1907, nine days after the adjournment of the Legislature. I now respectfully make the following answer to the order.

The Constitution provides, Art. VI, sect. 3, that the Justices "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Council, Senate or House of Representatives." By this constitutional provision, of course, the Justices are not obliged to give their opinions unless the inquiries relate to "important questions of law," nor unless they are made upon "solemn occasions." And as I shall undertake briefly to show hereinafter, if the Justices are not obliged to answer the questions, if they do not relate to important questions of law, or if

the occasions are not solemn, it would be improper and inexpedient for them to give their opinion. And if this be so, they have no right to give an opinion, and may properly decline and should decline to do so.

So that I must first inquire whether the constitutional exigency has arisen, which requires, or in other words, which makes it proper for me to give my opinion on the questions presented. And this involves the further inquiry, who is to decide? Is the order of the Senate conclusive upon the Justices, or have the Justices, each for himself, an independent right, equal with that of the Senate, to determine the question? These alternatives were very carefully considered by all the Justices in their opinions in answer to an order of the House of Representatives, found in 95 Maine, 564. And a majority of those then in commission were firmly of the opinion that the Justices, each for himself, must determine whether the condition exists which requires the giving of an opinion. Among the Justices who were then of that opinion were the late Chief Justice Wiswell, and Justice Fogler, both since deceased, and Justice Powers, since resigned. The conclusions thus expressed by the majority of the Justices were based not only upon a careful analysis of the constitutional provision itself and the relations existing between the legislative and judicial departments of the government, but also upon the unanimous opinion of the Justices who composed the court in 1891, 85 Maine 546, as well as upon the opinions of the courts in Massachusetts and New Hampshire, under similar constitutional provisions, 122 Mass. 600; 126 Mass. 557; 148 Mass. 623; 56 N. H. 574; 67 N. H. 600.

But, since I have been advised that I alone of the present Justices hesitate to answer the questions submitted by the Senate, I have carefully reviewed the constitutional questions involved, and it is with sincere regret, after reconsideration and much reflection, that I feel compelled to say that the opinion of the majority of the Justices in 95 Maine 564 and

the reasons given therefor, which I then subscribed, but which I need not repeat, seem to me to be sound and compelling, and that I cannot do otherwise than adhere to them. When under the Constitution I am asked, as a member of that court which the Constitution makes both independent and co-ordinate with the other branches of the government,—and of that court whose interpretation of the Constitution is binding upon all the branches of the government,—to give my opinion to either of those branches, I think I am bound to interpret what the Constitution means by "important questions of law," and by "solemn occasions," and by that interpretation to determine whether the question is important and the occasion solemn.

There can be no doubt that the order under consideration presents important questions of constitutional law. The only question is, is the occasion solemn? I make no question but that when either branch of the legislature asks the opinion of the Justices touching pending legislation, or it may be even, upon matters concerning which that branch may be expected to act, and can act, it is a solemn occasion within the meaning of the Constitution. On the other hand it is my conviction that when there is no pending legislation touching which the opinion of the Justices is asked, or when it is demonstrably clear that the body asking the opinion neither expects nor intends to act upon it, and therefore has no occasion to be advised, it is not a solemn occasion.

I cannot conceive it to have been the intention of the framers of the Constitution, or of the people who adopted it, that the Justices should be required by a branch of the legislature to give their opinion on questions of law merely for the information of the public, or for the possible use of future legislatures. Each legislature will judge for itself what advice it needs, and what subjects it will legislate upon.

I hold that it is not a solemn occasion, within the meaning of the Constitution, unless the body asking the questions is in a position to act later in the light of such opinions as may be

given. The Constitution implies, I think, that the opinion may be of some use to the body requiring it, in the performance of its constitutional functions. If not, there is no occasion, solemn or otherwise, for the opinion.

As already stated, the order now being considered was passed March 27. The legislature adjourned March 28. The legislative history of these two days, which is now a part of the recorded history of the State, shows that the legislature was on the eve of adjournment when the order was passed. It had so far completed its work, and the hour of expected final adjournment was so near, that by no possibility could the opinion of the Justices have been obtained before such adjournment. And apparently there was not then, nor has there been since, any reason to expect the legislature to be reconvened. I am therefore, I think, compelled to conclude that the Senate requested the opinion of the Justices not for use in any expected action, to be taken by itself, but for the future use of the public, or of future legislatures. If so, I think the occasion was not a solemn one. And in this connection, I refer again to the opinion of the majority of the Justices in 95 Maine, 564, and to the reasons given and to the authorities cited therein. And I may add, that even if it was a solemn occasion when the order was passed, it had ceased to be such nine days before the order came to me.

To my mind it is manifestly improper for the Justices to express their opinions on questions of law concerning the rights of citizens, except in the performance of their judicial functions, unless it be in the case of a constitutional solemn occasion as I have conceived it to be defined. I think that this provision of the Constitution should be read and construed in the light of that fundamental provision of law that the citizen shall not be deprived of his life, liberty, property or privileges, except by the "law of the land," that law "which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial."

Any answers to the questions before me will vitally affect the interests of many hundreds of property owners, and a vast amount of property. To lay down a rule which deprives a man of his property or restricts him in the use of it, is in effect to deprive him of his property. But the Justices are asked to determine whether such a rule may be laid down. They are asked to do this under circumstances which preclude argument. The persons to be affected are virtually to lose the protection of the law of the land. They are not suitors. They are not to be heard before they are condemned. There is to be no inquiry, and judgment is to be rendered before, and not after trial.

The answer usually given to this proposition is that the Justices are not bound by their opinions thus given, that they are opinions simply, and not law, and that when actual cases arise, and suitors are in court and are heard, the Justices as a court are at perfect liberty to lay down such doctrine and render such judgment as may then seem to them meet. It may be so. Nevertheless, it is my belief that while human and judicial nature remain as we know them to be, the opinion of the Justices will quite likely be the judgment of the court. And in any event, it must be said that the right of the citizen is likely to be prejudiced, if not prejudged.

These considerations, of course, should not and do not prevent full force being given that provision of the Constitution which is under consideration. Either branch of the legislature may require the opinion of the Justices upon solemn occasions, and in such case the citizen must be content to be prejudiced, and practically prejudged. And, no doubt, when such opinions are asked upon such solemn occasions, as I understand the Constitution to mean, they may so serve the public good, that individual interests ought to yield the rightful advantage of being heard.

But the considerations I have named do demonstrate, I think, the expediency and necessity of limiting the giving of these

extra judicial opinions to such occasions as fall fairly within the spirit as well as the language of the Constitution. And they emphasize what seems to me to be the impropriety of giving such opinions, unless when required by the Constitution, as well as when requested by another branch of the government.

With great deference to your Honorable Body, the undersigned, a Justice of the Supreme Judicial Court, for the reasons stated, feels compelled most respectfully to decline to give an opinion upon the questions submitted.

March 2, 1908. ALBERT R. SAVAGE.

STATE OF MAINE.

January 7, 1909.

Received and on motion by Mr. STAPLES of Knox, laid on table to be printed.

F. G. FARRINGTON, *Secretary.*