

MAINE STATE LEGISLATURE

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RESOLVES

OF THE

EIGHTEENTH LEGISLATURE

OF THE

STATE OF MAINE,

PASSED AT THE SESSION

WHICH COMMENCED ON THE THIRD DAY OF JANUARY, AND ENDED ON
THE TWENTY-THIRD DAY OF MARCH, ONE THOUSAND
EIGHT HUNDRED AND THIRTY-EIGHT.

PUBLISHED AGREEABLY TO THE RESOLVE OF JUNE 28, 1820.

AUGUSTA:
LUTHER SEVERANCE, PRINTER.
1838.

STATE OF MAINE.

IN SENATE, March 8, 1838.

The Joint Standing Committee on the Judiciary, to whom was referred the petition of Warren Clark and Mary Clark, praying that the bonds of matrimony may be dissolved, because after having lived in the marriage state four years, they find their tempers and dispositions so utterly incompatible, that the "matrimonial chain has become exceedingly galling"—have had the same under consideration, and ask leave to submit the following

REPORT :

As petitions of this kind have become somewhat frequent, and as unfortunately, as your committee believe, for the character of the State, they have, in some two or three instances, been successful; the petition now under consideration would seem to furnish a fit occasion to examine as to the power of the Legislature, in such cases, to entertain jurisdiction and grant relief; so that if it should be found, on examination, that it cannot rightfully exercise such power, its time, in future, may not be consumed in investigating the facts in such cases, and the people may become satisfied that the Legislature is not the proper tribunal to which application for relief in such cases is to be made.

Marriage is not considered as a mere contract, liable to be continued or dissolved at the pleasure of the parties, and as having only the incidents of an ordinary contract; but it is treated and considered as more—as a civil institution, more interesting and important, in its nature and consequences, than any other known to society; inasmuch as it involves the sound morals, the domestic affections, and all the tender and endearing relations and duties of parents and children. "And it may be truly said, that Christianity, by giving to it a more affecting and sublime morality, has conferred on mankind new blessings, and has elevated woman to the rank and dignity of an equal, instead of being a humble companion and a devoted slave." Our laws in relation to divorces are made in reference to considerations of public policy, and not to the mere contract of the parties; and therefore they are not permitted to make the marriage contract dissoluble or indissoluble by any private agreement made at or after the marriage. The question then arises, to what tribunal does it belong to dissolve the marriage contract—a contract, as above described, far transcending, in its importance and effects on society, all other contracts? Is the

exercise of such a power, in its nature, judicial or legislative? Your committee are constrained to believe it is essentially judicial. Our constitution declares "that the powers of this Government shall be divided into three distinct departments; the Legislative, the Executive and the Judicial;" "that the Legislature shall have 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." It also provides that "the Judicial power of this State shall be vested in a Supreme Judicial Court, and such other Courts as the Legislature shall, from time to time, establish;" and that "every person, for an injury done in his person, reputation, property or immunities, shall have remedy by due course of law." From these provisions in our Constitution, it would seem to follow, that it is the appropriate business of the Legislature to make laws for the benefit of the people; and the legitimate province of Judges to interpret, expound and apply them. If the Legislature undertakes to dissolve a marriage contract, it either conforms its decision to the existing laws in relation to divorces; or it disregards these laws, and in effect, makes a new law unknown to all the world before, and then proceeds to apply it to the particular case. If it conforms its decision to existing laws, it then exercises concurrent authority with our Courts; and if it can properly exercise concurrent authority in this all important class of cases, why may it not extend its jurisdiction and power to all other cases? and thus our Legislators, becoming our Judges, would be brought, in the language of some of the petitions to this Legislature, "within the reach of the people," and that annually too. And Judges of this character, it will be perceived, would not be subject to be impeached or removed on address—an inconvenience to which the Judges known to our Constitution are very properly subjected. But if, in such cases, the Legislature, in effect, makes a new law unknown before, fitted to each particular case as it is presented, and applies it to such case, it must be conceded by all, it violates that provision of the Constitution which gives every person, for an injury done, "a remedy in due course of law." Besides, laws in order to be constitutional, cannot look to the past or the present, but to the future, otherwise they violate the very definition of a law, which is a "rule of civil conduct." They must also be passed according to certain forms, and be promulgated; neither of which is done in the case supposed. They must also apply to the whole community, and not to particular individuals, otherwise they would be a violation of the equality of rights and privi-

leges guarantied by our Constitution to all our citizens. The Legislature is not, then, a branch of the Judiciary, as known to our Constitution, nor is it a Court in the last resort, having the right, in divorce cases, to prescribe and apply to each particular case, such principles as suits its pleasure—acting, in fact, above and beyond all law. There are many other considerations and views connected with this question, which might be suggested and presented; but sufficient has been said, as you committee believe, to establish the position, that the Legislature cannot, in any case, nor under any circumstances, rightfully undertake to dissolve the marriage contract.

Your committee, therefore, submit the following Resolve :

T. BOUTELLE, *Chairman.*

Resolve respecting the dissolution of the marriage contract.

RESOLVED, That to dissolve the marriage contract is the proper exercise of Judicial power, acting according to the known laws of the State ; and that the Legislature cannot rightfully exercise such power—and, therefore, that the petitioners in this case have leave to withdraw.

IN SENATE, March 8, 1838.

This Report was read and accepted and the Resolve passed and

ORDERED, That the Secretary of State be directed to publish the Report and Resolves in the volume of Resolves, and also publish the same in all the papers that publish the laws of the State.

Sent down for concurrence.

N. S. LITTLEFIELD, *President.*

HOUSE OF REPRESENTATIVES. }
March 9, 1838. }

Read and concurred.

E. H. ALLEN, *Speaker.*

STATE OF MAINE.

IN SENATE, January, 29, 1838.

The Joint Select Committee, to which were referred the returns of votes on the Resolve entitled a "Resolve to amend the Constitution relative to Bail," ask leave to

REPORT

That the whole number of votes returned in the affirmative, is 9,705—in the negative, 8,757—being 948 votes more in the affirmative than in the negative. Of all the lists returned, that of the City of Portland, alone, giving 58 votes in the affirmative and 100 in the negative, appears to be entirely conformable to the Resolve. That from Bangor only varies, however, in giving the votes of "Inhabitants qualified to vote for Governor and other officers, instead of those qualified to vote for State Officers." No other returns were certified to have been sealed up in open town meeting, and but three others stated any qualification of the inhabitants who voted. The blanks furnished, however, included no such qualification, and had no such certificate. Thirteen returns did not state on the inside in what town the votes were cast; but did so state on the outside, and had the name of the town affixed to those of the Select men inside. The votes of Windham and Lisbon, being 169 in the affirmative and 17 in the negative, were received at adjournments of their several meetings, on the week following that of the second Monday of September. No votes were rejected on account of these informalities.

The returns from Kennebunk, Union, Warren, Canaan, Concord, St. Albans, Strong and Edinburg, 183 yeas and 208 nays, had no name of any town inside. Those from Rome and Sumner, 99 affirmative, and 82 negative, were never sealed. Those from Lovell and Stoneham, giving 62 votes, all in the negative, were signed by only one Selectman. The list from Poland, of 10 votes in the negative, was not certified by the Town Clerk, inside or outside. The return from Litchfield, of 89 votes in the affirmative, appears not to have been returned to the Secretary's Office until January 2d. That from Temple, of 4 in the affirmative and 67 in the negative, was handed to the committee, unsealed, January 15th. All these returns, giving 375 votes in the affirmative, and 429 in the negative, were rejected. Two returns were received from towns which gave no votes, and no returns were received from 56 towns and plantations.

The returns thus allowed give 17,658 votes in the whole, of which nine thousand three hundred and thirty were in the affirmative, expressed by the word "Yes," and eight thousand three hundred and twenty-eight votes in the negative, expressed by the word "No"—one thousand and two more votes being in the affirmative than in the negative.

Your Committee therefore recommend the passage of the following Resolve: All which is respectfully submitted.

B. RANDALL, *Chairman.*

RESOLVED, The Senate and House of Representatives concurring, that, whereas it appears, upon an examination of the lists of votes laid before the Legislature in pursuance of a Resolve passed March thirtieth, A. D. 1837, entitled a "Resolve to amend the Constitution relative to bail," that a majority of the inhabitants voting on the question is in favor of said amendment: It is therefore declared "that the tenth section of the first Article of the Constitution is so far altered or amended as to read, that "No person before conviction shall beailable for any of the crimes which now are or have been denominated capital offences since the adoption of the Constitution, where the proof is evident or the presumption great, whatever the punishment of the crimes may be": and that said amendment has become a part of the Constitution.

IN SENATE, March 20, 1838.

This Resolve having been read was passed and sent down for concurrence.

N. S. LITTLEFIELD, *President.*

HOUSE OF REPRESENTATIVES, March 21, 1838.

Read and passed in concurrence.

E. H. ALLEN, *Speaker.*

STATE OF MAINE.

IN SENATE, March, 1838.

The Joint Standing Committee on State Prison, to which was referred the communication from the Governor, transmitting the Report of the Warden and Inspectors of the State Prison, have had the same under consideration, and ask leave to submit the following

R E P O R T :

That it appears by the Report of the Inspectors, that the account of the Prison with the State for the transactions of the past fourteen months, ending 31st December, 1837, is as follows:—

The State is debited with the amount of articles purchased for the various departments of labor, and expenditure in and about the Prison, includ-

ing payments of officers' salaries, balances of old accounts due from the Prison, and all disbursements, except the Warden's salary	\$36,389 90
The balance against the State at the last annual examination as per Report	\$3,455 93
Stock on hand November 1st, 1836,	\$6,926 61
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Amounting in all to	\$46,772 44
The State is credited with the amount received from State's Treasury	\$11,152 84
Also for amount received from the sales of manufactures, and production, and from old accounts due the Prison	\$22,776 80
Stock, tools, manufactures, &c. on hand December 31st, 1837,	\$11,063 51
	<hr/>
	\$44,993 15
	<hr/>
Balance of Prison account against the State is,	\$1,779 29

The expenditures of the Prison, including the balance reported against the State last year, amount to	\$39,845 83
And all the receipts for manufactures and productions sold, together with amounts received from the State's Treasurer, and old accounts, amount to	\$33,929 64

Balance due from the State to the Warden, \$5,916 19

The Committee having examined the accounts of the Warden and compared them with the Report of the Inspectors, find them correct, and also that he has produced satisfactory vouchers to substantiate all his charges. After deducting the amount of receipts from the amount of expenditure, they find the balance as above stated.

By the Report of the Inspectors, the expenditures of the Prison over its natural receipts for the last fourteen months were	\$13,613 10
The amount expended on buildings and repairs during that time, was	\$6,087 12
The value of the present stock over that of last year, is	\$4,136 90
And there was a loss by fire in stock and manufactures	\$2,500 00
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	\$12,724 00

Balance over expenditure for buildings, repairs and loss by fire	\$889 08
Add to that sum the amount received on old accounts more than was paid out	\$660 14

Amount expended for the support of the prisoners over the receipts for their labor including all the officers' salaries except that of the Warden \$1,549 22

There has been erected, the last season, a large stone building within the yard of the Prison, 100 feet long by 34 feet wide and two stories high, which contains a cooper's shop and lumber room in the basement, wheelwright's and painter's shops on the second floor, and a spacious room in the attic for a chapel, &c. There has also been sunk in the yard, three large cisterns made with hydraulic cement, with capacity to hold one hundred hogsheads of water, besides many other improvements, adding much to the value and appearance of the premises.

There has also been constructed a perpetual lime-kiln, for burning lime with hard coal. It was kept in operation about four months in the latter part of last season, and the result has given encouragement that it will become a considerable source of income to the Prison.

The number of prisoners during the past year has averaged about 77, and they have been mostly employed in quarrying lime rock, at shoe-making, the wheelwrights', blacksmiths' and coopering business, and the manufacturing of lime.

From all the evidence presented to the Committee, they are constrained to believe that the several departments, for the employment of the prisoners, have been well arranged and promise hereafter a productive income. And they have good reason to hope that, under the supervision of the present efficient Warden, the prisoners will not much longer be an expense to the State.

The Inspectors say in their Report, that the old accounts due the Prison, which had accumulated under the former Wardens, as they were turned over to the present Warden, on the 5th of August, 1836, amounted to \$12,239 07. Of this amount, \$3,477 is due from Ira Norris, and \$3,399 from Foster Bryant, making the total amount due from these two persons \$6,876.

These claims have been in suit for some four or five years in the Courts of New York, and the latter is still pending, with all the uncertainty of a contested claim hanging over it, in her

Courts of Chancery. The expenses which have been paid already by the present Warden amount to \$54, and bid fair to be much increased.

Of the above amount of old accounts due the Prison, there has been received \$1,098. The amount paid out for old balances due from the Prison, is \$437 86.

Ira Norris was the first agent employed in the city of New York, by the Warden, to sell cut granite for the Prison. He was considered at that time perfectly good, but about the year 1831, he suddenly sold out his property and absconded, with, as was supposed, from eight to ten thousand dollars, and has not since been heard of, consequently there is no prospect of ever recovering any thing from him.

Foster Bryant was the next agent appointed to sell granite in the city of New York. A contract was entered into between him and the Warden, that he should have all the cut granite at a fixed price, and that the contract should continue until the Inspectors of the Prison decided that it should be relinquished.

This contract continued nearly two years. Bryant received all the stone which was cut, and paid for it from time to time.

He then formed a project of superseding Maine granite, by introducing Petapsco granite from Maryland, and removed to Baltimore for that purpose. The Inspectors then directed the Warden to dispossess Bryant of his agency as soon as possible. The Warden went to Baltimore, settled with Bryant, took two notes for the amount due, and then notified him that the Inspectors had put an end to the contract. Bryant complained that he ought to have it continued, or to have known it before he settled. The notes were negotiated by the Warden, one with the Central Bank at Hallowell, the other with the Thomaston Bank. They were sued in Philadelphia, and Bryant stood trial, but as he made out no defence, judgment was obtained against him. The present Warden sued those judgments in New York, and he held Bryant to bail. Bryant, to obtain delay, filed a bill in Chancery to stop the proceedings; to this bill it was necessary to reply, and, as many parties were included in the bill, it has occasioned much delay and expense, the amount of which is unknown to the Committee.

Bryant is supposed to be a man of property, and in addition to that, the State holds a bond to make good what he does not pay. This case is now in charge of a skilful Attorney in the city of New York, but as it is uncertain when it will be brought to a close, the probability is that the expense will swallow up a large proportion of the debt.

The Inspectors notice in their Report, that selling or retailing out, from the articles purchased solely for the use of the Prison, for the accommodation of officers and others living in the vicinity, has always been practiced, and that they object to it on account of its encumbering the books with needless items and tending to confuse the accounts. The Committee believe that the practice of retailing from the stores of the Prison is bad, not only as having a tendency to confuse the accounts, but being to some extent injurious to the interests, discipline, and good order of the institution, as it must inflict upon the officers a useless labor, foreign from the duties assigned them in their several departments, and they know no good reason why the practice should be indulged. The Committee, therefore, recommend that the practice be discontinued.

Among the subjects recommended by the Inspectors as claiming the attention of the Legislature, is that of striving to promote a moral and religious feeling among the convicts. The object of Prison discipline is, or ought to be, designed to improve the moral condition of those unfortunate men, who, in most cases, have been deprived of their liberty in consequence of neglect of moral and mental cultivation; and however degraded their present condition, they are still our fellow creatures, and entitled to our sympathy and care.

The Committee are impressed with the belief, that attention to this subject is necessary, not only to make them more orderly and useful while in the Prison, but that when their time expires, they may go out better men; feeling a consciousness that their confinement, privations and suffering have not been without their reward.

The Inspectors recommend such an increase to the compensation of the Chaplain as will command his services constantly at the Prison, that the benefit of his labors may be had in morning and evening prayers, and in imparting more full and systematic instruction to the prisoners on the Sabbath by his advice and influence among the convicts, and by instructing those who are unable to read, but are willing to learn.

There is now allowed by law for Chaplain \$100, and for support of the Sabbath school in the Prison \$50. From the best evidence the Committee have been able to obtain, it would require from \$400 to \$450 in addition to the sum now allowed for Chaplain and Sunday school. The Committee have considered, that as it is contemplated to remodel the Prison, which when done, may suggest some change and improvement in its discipline, which might interfere with any arrangement made

at this time, have therefore come to the conclusion, that it is important to keep the subject in view, to be acted upon in future, although they do not deem it expedient to recommend any action at present.

The next important subject presented for the consideration of the Committee, is that of remodeling the Prison building. The Inspectors say in their Report, "that the mere appearance of those stone jugs, into and from which the prisoners must descend and ascend, by the help of a ladder, is a sufficient objection to them. But it is not the appearance of these cells, or the inconveniences attending their peculiar construction which we would urge as the principal reason for abandoning them, or remodeling the Prison.

"There are real and unavoidable ills imposed upon the convicts, by their confinement in their cells, which claim consideration as violations of the common duties of humanity."

The Commissioners appointed in 1836, to investigate this subject, in their Report recommend remodeling this Prison on the Auburn plan, and also removing it to Hallowell. In support of which they offer two prominent reasons; first, that, among the employments most suitable for convicts, that of stone hammering is one, and that Hallowell is a convenient location for that business; secondly, that it is near the State House, and would be convenient for the inspection of the Legislature.

Whatever weight ought to be given to these arguments in determining this question, it is overbalanced if economy is to be consulted.

When we consider the large amount of money that has been expended by the State in land, and in erecting buildings for the Warden, and the extensive workshops, yards, lime kilns, and other arrangements for the employment of the prisoners, all of which are good and well adapted to the Auburn plan; and that the materials of the old cells are nearly sufficient, with some slight alterations, to rebuild them upon the plan proposed, all of which must be sacrificed if the Prison is removed; and that the location is such that the prisoners can be employed as profitably where they now are, as in any other place, the Committee do not entertain a doubt that it is most for the interests of the State to remodel the Prison where it now is.

After a full investigation of this subject and all the circumstances connected with it, the Committee have, unanimously, come to the conclusion, that the Prison should be remodeled as soon as practicable. But in undertaking a work of such magnitude as this, it is necessary that plans should be matured

and estimates accurately made from a survey of the premises.

There is not time to accomplish this in a manner appropriate to its importance, in season for the action of this Legislature.

The Committee, therefore, in order that the subject may be matured, ask leave to report a Resolve, which is herewith submitted.

EDWARD ROBINSON, *Chairman.*

[See Chapter 47 for Resolve.]

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, }
March 15, 1838. }

The Joint Select Committee, to whom was referred an Order "to inquire into the expediency of requesting our Senators and Representatives in Congress to use their exertions, that further negotiations be made with her Britannic Majesty, that all the Ports in the Provinces of Nova Scotia and New Brunswick, be made ports of entry and discharge for all vessels belonging within the jurisdiction of the U. States, and report by Bill or otherwise," have had the same under consideration, and ask leave to

R E P O R T :

That by an Act of Congress, passed May 29, 1830, "regulating the commercial intercourse between the United States and certain Colonies of Great Britain," and by the Proclamation of the President, dated the 5th of October, 1830, made in pursuance of the considerations named in said Acts, *all* the ports of the United States were opened to the admission of British vessels and their cargoes coming from the British Colonial possessions in the West Indies, on the Continent of S. America, the Bahama Islands, the Caicos, the Bermuda Islands, and also to British vessels and their cargoes coming from the British Colonies north and east of the United States: That the principal articles of export from said Colonies north and east of the U. States, more particularly from the Provinces of Nova Scotia and New Brunswick, are free-stone for building, or manufactured into grindstones, and gypsum, or plaster of Paris: That the Atlantic States receive their whole supply of these articles from said Provinces last named, and that the amount thus consumed by them, your Committee believe to be nearly two hundred thousand tons of gypsum, and eighty thou-

sand grindstones, annually, besides large quantities of free-stone for building.

Your Committee would further state, that British vessels now take cargoes directly at the quarries and landings where gypsum and free-stone are quarried, in said Provinces of Nova Scotia and New Brunswick, and are allowed by the law of the United States, before referred to, to enter and discharge their cargoes, so taken, at any and every port in the United States, where our vessels are allowed to enter and discharge; but that there is NO PORT in either of the Provinces of Nova Scotia or New Brunswick, at which an American vessel can obtain a cargo of gypsum or grindstones, unless it has been first transported in an English vessel, a distance of nearly two hundred miles, to some one of the ports in said Provinces now open. These ports,—namely, Halifax, Yarmouth and Pictou, in Nova Scotia, and St. John and St. Andrews in New Brunswick, may, at any moment, however, be closed against all American vessels, without conflicting, in the remotest degree, with any existing treaty, or stipulation, between our government and Great Britain.

Your Committee add, that the necessary consequence of the present arrangement is such, that the freighting of the articles they have enumerated—plaster and grindstones—which, under a former arrangement, was more equally divided between American and English vessels, is now almost exclusively confined to those of New Brunswick and Nova Scotia, and, in a year or two, must become entirely so, under the powerful impulse which has been given to the ship building interest in those Provinces, by the present monopolizing and anti-reciprocal regulation of the commercial intercourse between the United States and the Colonial possessions of Great Britain.

With these facts before them, and with the additional considerations, that the greatest portion of the productions of New Brunswick and Nova Scotia, most valuable for exportation, are plaster and grindstones; that the ports at which these articles can be obtained are closed to American vessels; that the State of Maine, depending largely on navigation for the employment of its citizens and capital, is, by the present arrangement, in common with other States, cut off from all participation in this trade, your Committee feel themselves justified in expressing a hope, that the Government of the United States will readily perceive the unequal and unjust operation of existing regulations, and take prompt measures to obtain the opening of all the ports in the British North American Colonies, or, if this result

cannot be obtained, to cause our ports to be closed against British vessels coming from said Colonies.

Your Committee, therefore, ask leave to submit the following Preamble and Resolutions.

EBENEZER OTIS, Per Order.

[See Chapter 64 for Resolves.]

MESSAGES OF THE GOVERNOR.

To the Senate and House of Representatives:

I herewith lay before you the Report of the Inspectors of the State Prison at Thomaston.

EDWARD KENT.

COUNCIL CHAMBER, }
 January 27, 1838. }

To the Senate and House of Representatives:

I herewith lay before you the Report and Account of the Agent, appointed to superintend and manage the sale and settlement of the Public Lands.

EDWARD KENT.

COUNCIL CHAMBER, }
 January 30, 1838. }

To the Senate and House of Representatives:

I herewith lay before you for your consideration a copy of a Resolve of the Legislature of the Commonwealth of Massachusetts, respecting the franking privilege; also a Resolve on the same subject passed by the Legislature of the State of Vermont.

EDWARD KENT.

COUNCIL CHAMBER, }
 January 31, 1838. }