ACTS AND RESOLVES

PASSED BY THE

EXTRA SESSION OF THE THIRTY-SECOND LEGISLATURE, 1853,

AND THE

THIRTY-THIRD LEGISLATURE

OF THE

STATE OF MAINE,

1854.

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1854.

OPINIONS

OF THE

JUSTICES OF THE S. J. COURT,

ON QUESTIONS PROPOUNDED BY THE HOUSE OF REPRESENTATIVES,
JANUARY 18, 1854,

WITH THE

STATEMENT OF FACTS, AND QUESTIONS.

STATEMENT OF FACTS, AND QUESTIONS.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES,
January 17, 1854.

ORDERED, That the following statement of facts be submitted to the justices of the supreme judicial court, and they be required to give their opinions on the questions appended thereto, viz:

On the first Wednesday of January instant, the members elect of the house of representatives assembled in the representatives' hall, and, a quorum being present, the members were qualified, and the house was duly organized by the choice of a speaker and clerk, of which organization the governor and council and senate were, by order, to be informed by message, according to the usual custom.

From an examination by the governor and council of the lists of votes returned to the office of the secretary of state, but thirteen senators appeared to be elected, leaving vacancies in the second, third, fourth, fifth, sixth, eleventh, and thirteenth districts—all which appeared by a report accepted by the governor and council.

The thirteen senators thus appearing to be elected assembled in the senate chamber on the first Wednesday of January current, and proceeded to organize by the election of a president and secretary pro tempore, after being duly qualified, of which the house of representatives was notified by message.

The secretary of state then laid upon the table of the senate the lists of votes for senators, which were referred to a committee for examination.

That committee on a subsequent day reported the election of the thirteen members who had been declared elected and summoned to appear by the governor and council, and further reported that vacancies existed in the second and fifth senatorial districts, and also the names of the constitutional candidates to fill those vacancies—which report was accepted. But no report was then, or has since been made, or vote passed, with reference to the other districts.

After the acceptance of the above named report, a message was

sent to the house of representatives, informing the house that vacancies existed in the second and fifth senatorial districts, giving the names of the constitutional candidates to fill the same, and proposing a convention to fill said vacancies—with which proposition the house refused to concur.

It has been the uniform usage in this state, since the formation of the government, to determine and declare all vacancies, existing in the senate on the day appointed for the meeting of the legislature in each year, before the members of the house of representatives, and such senators as shall have been elected, proceed to elect, by joint ballot, the number of senators required, and then to appoint a convention for that purpose.

In the year 1847 but eleven senators appeared to be elected. The senators elect met on the day appointed, elected a president and secretary pro tempore, and the votes for senators were laid on the table, and committed. The committee subsequently reported who were elected, and also the whole number of vacancies existing in the senate and the names of the constitutional candidates to fill said vacancies. This report was accepted, and a message was subsequently sent to the house, informing that body that vacancies existed as reported by the committee, and stating the names of the constitutional candidates to fill the same, and proposing a convention for the purpose of filling the same, with which proposition the house concurred, and the same were filled accordingly.

In the year 1851 but fifteen senators appeared to be elected, and the same course was taken.

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QUESTIONS.

First. Whether, if a majority of the whole number of senators required by law are elected, and the senate duly organized, the provisions of section five, article four, part second, of the constitution require, or contemplate, that the senate shall determine who are elected to be senators in all the senatorial districts, before the members of the house of representatives, and such senators as shall have been elected, proceed to elect, by joint ballot, the number of senators required? If the constitution does so require, does it necessarily result that all existing vacancies should be ascertained and declared before proceeding to such election?

Second. Whether the provisions of that section contemplate, or authorize, a convention, in the first instance, for the purpose of filling a part only of the vacancies existing in the senate on the first Wednesday of January?

Third. Whether a senator, elected by "the members of the house of representatives, and such senators as shall have been elected," to fill a vacancy existing on the first Wednesday of January, is entitled

to vote in a convention held for the purpose of filling other vacancies in the senate, existing on said first Wednesday of January?

Fourth. When less than a majority of the whole number of senators required by law appear, by the lists returned to the office of the secretary of state, to be elected, can such senators, less than a majority, constitute "the senate," in the sense in which that term is used in the constitution? Can such senators, less than a majority, exercise the powers, or perform all, or any part of, the duties devolved upon "the senate" by section five, article four, part second, of the constitution? If so, what part? Can such senators, less than a majority, decide on the legality of election returns as shown by the lists returned to the secretary's office, receive evidence of election other than is contained in such lists, and determine elections upon such evidence? Can they declare vacancies in the senate, and determine who are constitutional candidates? If so, upon what evidence?

Fifth. When the house of representatives has been duly organized, and a minority only of the whole number of senators required by law appear to be elected, can the members of the house and a minority of such senators as appear to be elected legally form a convention for filling vacancies in the senate, all of such senators being duly notified, but a majority refusing to act?

Ordered, That a copy hereof, signed by the speaker, and attested by the clerk of this house, be communicated forthwith, and by the most expeditious mode, to each of the justices of the supreme judicial court, and an answer to the foregoing questions requested at the earliest possible moment.

HOUSE OF REPRESENTATIVES, January 18, 1854.

Read and passed.

NOAH SMITH, JR., *Speaker.*

Attest: JOHN J. PERRY, *Clerk.*

OPINIONS OF THE S. J. COURT.

PORTLAND, January 26, 1854.

Hon. NOAH SMITH, JR.,
Speaker of the House of Representatives:

DEAR SIR: Enclosed herewith I have the honor to transmit opinions of justices of the supreme judicial court, in obedience to an order of the house passed on January 18, 1854.

Most respectfully,

ETHER SHEPLEY.

THE undersigned, justices of the supreme judicial court, present the following observations and answers to communicate their opinions and some of the reasons therefor, in obedience to an order of the house of representatives, passed on January 18, 1854:

The constitution provides that "the legislative power shall be vested in two distinct branches, a house of representatives and a senate, each to have a negative on the other."

In several sections the words "each house" are used to designate the respective branches. In others the word "senate" is used to designate the branch so denominated. No term is found to be used in the constitution, other than senate, or house, or house of representatives, to describe or designate those branches when less than a quorum of members is present. When so composed, the senate is designated by the word "house" in article four, part third, and sections three, four, five and six; and is authorized to exercise certain of the powers conferred upon the senate by those sections. By the third section it may, when so composed, adjourn, from day to day, compel the attendance of absent members, provide the manner in which their attendance shall be procured, and prescribe the penalties under which they shall be required to attend.

By the fourth section it may, when so composed, punish its members for disorderly behavior. If such were not the true construction, it could not protect itself, or be in a condition to perform duties required of it when so composed.

By the fifth section it is required, when so composed, as well as at other times, to keep a journal of its proceedings.

By the sixth section it may, when so composed, punish a person not a member, for obstructing its proceedings, or assaulting or abusing any of its members for anything said or done in the senate. This construction is also necessary for its protection, and to enable it to perform duties enjoined upon it when so composed. Other powers named in those sections it may not be authorized to exercise when so composed.

The governor and council are required to "issue a summons to such persons as shall appear to be elected by a majority of the votes in each district, to attend that day (the day appointed by the constitution) and take their seats." They must take their seats as senators, and can act only in their official capacity, and in that capacity they must act as a branch of the legislature for certain purposes. It is only as representing that branch that they can be authorized to organize in any manner as a senate, or to notify the other branches of the government of their organization or presence in the chamber appointed for them, or can receive from the governor and council the copies of the "lists," or can adjourn or keep a journal. These are acts essentially necessary to be performed, whether a majority of the senators be or be not elected and present. Unless this be the true construction, this branch of the legislature may, under certain circumstances, fail to be organized according to its provisions.

The words "senate" and "house" appear to be used in the constitution to designate that branch, whether composed of a greater or less number of senators, when it is in a condition to keep a journal or record of its proceedings, or to perform acts required of it or authorized by the provisions of the constitution.

In the year 1830, when a quorum of both branches of the legislature were present, the justices of this court gave their opinions that no other body than the senate could, under the constitution, designate the constitutional candidates to supply deficiencies of senators occasioned by omissions to elect by the qualified voters. When less than a quorum of senators is present, no express provision is found in the constitution to authorize such a designation. It is not perceived how any such power can be implied without depriving the senate of the power of being the judge of the election and qualification of its own members.

By the fifth section of article four and part second, it is provided, "the senate shall, on said first Wednesday of January, annually, determine who are elected by a majority of votes to be senators in each district."

If the word "senate" or "house" be used in this section and in all other parts of the constitution, as it appears to be, to designate that branch, whether composed of a quorum or a less number, the power to perform that duty is expressly conferred upon a senate so composed,

unless its power to do it is restricted by some other constitutional provision. No such provision is found, unless it be in the phrase "and a majority shall constitute a quorum to do business." That phrase or provision should not receive such a construction, without the most urgent necessity for it, as would under any conceivable circumstances prevent the organization of the legislature according to the provisions of the constitution, and leave the state without a constitutional government, to be governed by one existing, and organized only as a necessity; or such construction as would prevent the performance by the senate of duties expressly required of it, and which cannot be performed by any other body or branch of the government, according to the provisions of the constitution.

If the only acts to be performed by a senate composed of less than a majority of senators, were considered to be fully enumerated in the latter clause of the third section of article four and part third, a senate so composed would be deprived of the power to protect itself, to keep a journal of its proceedings, and of the power to punish its own members or others for obstructing its proceedings.

It is not unusual to find language used when a particular subject is under consideration, which would be too comprehensive to exhibit the idea intended, if not limited by the subject occupying the thoughts. The subject then under consideration appears to have been the "legislative power." It does not treat of their organization. That had been provided for before. It treats of their power to do business after they have been duly organized. That language may, therefore, upon familiar principles of interpretation, be regarded as applicable only to such business as the houses could respectively perform after they had become organized, and as not applicable to proceedings required to procure an organization. When considered as thus restricted, and yet as having its intended and appropriate meaning, there is found no limitation of the authority of the senate, whether composed of a majority of the senators or not, to determine under any circumstances, and for all purposes, who are not elected by a majority of the qualified voters to be senators, and are eligible or qualified to be senators.

If a senate so composed could not constitutionally so determine, senators legally elected by qualified voters, and having the qualifications required for senators, might be excluded from the senate, and deprived of the rights secured to them by the constitution. If all vacancies apparent from the proceedings of the governor and council were to be filled by joint ballot of the members of the house and such senators as shall have been elected, those senators so elected could not be deprived of their seats by a subsequent decision of the senate alone. Those who are assembled to make such elections by joint ballot, must of necessity and by a power fairly implied, determine who have been so elected; and when they have so determined, the vacancies are filled according to the provisions of the constitution, and the constitutional right to be senators is secured to them. If the senate alone could

determine that such senators were not legally elected, and not entitled to their seats, they could annul the proceedings of the body or convention authorized to elect them and to decide that they had been legally elected. If this could be done once, it might be continued to be done, and the final organization of the senate be prevented for an indefinite time. This would neither comport with the language or intention of the constitution. The elections of senators, respecting which the senate is made the exclusive judge, are such as are made by the qualified electors. The election of senators by a joint ballot must be made from the "lists" of persons voted for, and made by the selectmen and clerks of the several corporations composing the district, or from copies of them. Persons whose names are not upon such lists cannot be elected. The senate, while determining who are constitutional candidates, must also be confined to such lists, and so must the governor and council, while ascertaining who appear to have been elected. This does not make such lists conclusive evidence who are truly elected senators, or who have the qualifications required for senators. No person, by such lists alone, can, therefore, be considered as conclusively entitled to be a senator, or as certainly not entitled to be one, by an election by qualified voters.

By this construction, and by this only, upon the facts stated, can the senate be constitutionally organized without considering some other branch of the government to possess powers not conferred upon it by the constitution, and without depriving the senate of power conferred upon it.

The construction of the constitution presented by this paper will, under any perceivable circumstances, enable the state to have a constitutional government without conferring powers upon any branch of the government not found to be vested in it by the constitution, and without depriving any branch of any power conferred upon it, and will prevent any occasion for a resort to a government of necessity. No other construction has been presented leading to such results.

By the third section of article fourth and part third, each house "may compel the attendance of absent members in such manner and under such penalties as each house may provide." This power is expressly conferred upon each house when composed of a less number than a quorum to do business. The word "members" in that section appears to have been used in the former clause respecting elections as designating senators who have not, as well as those who have, been qualified and been present as members of the senate; and no sufficient reason is perceived why the word should not have the same meaning in the latter clause of the same section. The section would then authorize a senate composed of less than a quorum to compel the attendance of those whom it adjudged to be members, whether they had ever been present as such or not. If this be not the true construction of the latter clause of that section, the senate, after a majority

of senators have been constitutionally elected, may fail to be organized and there may be no constitutional government in the state.

If the governor and council should ascertain that a majority of the whole number of senators had been elected, and should summon them to appear at the appointed time and place, and a sufficient number to prevent a quorum should deny that they had been constitutionally elected, or should for factious purposes willfully refuse to attend, thereby to prevent a quorum, those who should attend, being less in number than could form a quorum, would then constitute a house or senate expressly authorized to compel the attendance of the absent members.

This construction of a similar provision in the constitution of the United States appears to have been sanctioned by rules adopted by the senate of the United States, as stated in Jefferson's Manual, on pages 24 and 25 of the edition published at Concord in the year 1823. The rule is said to be "in case a less number than a quorum shall convene, they are hereby authorized to send" "for any or all absent members." "And this rule shall apply as well to the first convention of the senate at the legal time of meeting, as to each day of the session." This rule as applicable "to the first convention of the senate," could not have been legally established unless the senate, when composed of a less number of senators than would form a quorum had authority, by the constitution, to compel the attendance of absent members. The senate of this state when so composed, to be enabled to compel the attendance of absent members, must determine who were elected. It would be expressly authorized to act as a senate to determine the manner in which their attendance should be procured, and the penalties to be incurred by their refusal to attend. It is only by its acts as a senate, that a number less than a quorum composing it could for such purpose issue any legal precept, which must be issued in the name and by the authority of the senate, or could cause the legislature to be organized, or could keep a journal of its proceedings. The governor and council are only authorized to ascertain who appear to be elected senators, and have no power to determine who are elected. That power is entrusted to the senate alone, and it must determine whether those appearing from the "lists" to have been elected, were elected and had the qualifications required for senators. Here then is an instance in which an express power is given to a senate composed of less than a quorum, and it may by possibility be of a single senator to determine who are elected senators and to compel their attendance. If any number of senators, however small, may be designated as a senate, and be organized and act, and may by an express power determine who are elected for one purpose, there can be no sufficient reason to conclude that it was not the intention of the framers of the constitution, that a senate composed in the same manner should act for all other constitutional purposes to determine who are not elected, for the purpose of procuring an organization of the senate in another and different mode.

The constitution requires the senate to determine who are elected senators by a majority of the qualified voters in each district. It contemplates it as an act to be performed on the day appointed for the first meeting of the members of the legislature after they have been elected. There is a provision in the fourth section of the ninth article, that in case the elections required shall not be completed on that day, the same may be adjourned from day to day until completed.

Circumstances may prevent the senate from being able to determine in one day, and for several days, who are constitutionally elected, having the required qualifications.

It is not made the duty of the members of the house, to meet the senators who have been elected to elect by joint ballot other senators before the senate has determined who are not elected in all the districts. It is not however considered that senators could not be legally elected by the agreement of both branches, before the senate had determined who were not elected in all the districts; while it is considered that each house may rightfully refuse to proceed to an election by a joint ballot until after a determination has been made by the senate respecting the non-election of senators in all the districts.

It is such senators and such only "as shall have been elected," who are authorized to vote in joint ballot with the members of the house to elect other senators. The words "shall have been elected," have reference to such senators as shall have been elected by the qualified voters. If it should be admitted that these words may properly describe those senators who have in any mode been elected before the elections by joint ballot are made, still the constitution contemplating all such elections should be made at one time, and on the day appointed for the first meeting of the legislature, it would not have been expected or intended that other electors should be entitled to vote, if circumstances should require an adjournment to another day, after a part of the elections had been made by joint ballot.

When a determination has been made, who are not elected senators, and who are the constitutional candidates, and other persons have been duly elected senators by joint ballot of the members of the two houses, there can be no revision of that determination without annulling the elections made in joint ballot, which is entirely inadmissible. Such determination is therefore necessarily a final and conclusive one.

By a construction which will authorize a number less than a quorum, to determine who are not elected senators, and what vacancies exist, and who are the constitutional candidates, there may be a compliance with every requirement of the constitution, and a constitutional government at all times secured; without such a construction there can be no such compliance, and no such security. And without such a construction occasions may frequently occur and circumstances be presented which will prevent the organization of a constitutional government without the exercise of power not conferred upon it by some branch of the government, or without a resort to the organization of a

government from necessity. There is little cause for alarm, that such powers may by possibility be exercised by one senator. Such an occurrence can be expected but rarely, if ever. Powers more extensive and important may, under the constitution of the United States, and under those of several of the states, be exercised by one person. Experience has proved that the most important and delicate trusts are as faithfully performed by one, and by a few persons, as by a large number of persons.

To the first question, the answer is: That section does require the senate to determine who are elected senators in a district before other persons can, by joint ballot, be elected senators for such district.

It does contemplate that the senate shall determine who are elected senators in all the districts, and "that all existing vacancies should be ascertained and declared before proceeding to such election." And each house may rightfully refuse to meet the other to make such elections by joint ballot until all existing vacancies have been so ascertained and declared; while this mode of proceeding is not regarded as so essential, that senators could not by the agreement of both houses be legally elected before all existing vacancies have been so ascertained and declared.

To the second question the answer is: The provisions of that section do not contemplate a meeting of the members of the two houses to make such elections by joint ballot "for the purpose of filling a part only of the vacancies existing in the senate on the first Wednesday of January." Those provisions are not regarded as forbidding such a course, when adopted by the agreement of both houses.

To the third question the answer is: A senator so elected is not entitled to vote in a meeting or convention of the members of the two houses "held for the purpose of filling vacancies in the senate existing on the first Wednesday of January."

To the fourth question the answer is in the affirmative to the first interrogation put in that question; and to the second interrogation put in that question, it is in the affirmative. To the third interrogation it is: All the powers required by the constitution to be exercised by the senate to procure an organization of that house. To the fourth interrogation the answer is in the affirmative, and to the fifth also. To the sixth the answer is: The senate being authorized to decide upon the election of its own members, must have the right to determine upon what evidence it will do it.

To the fifth question the answer is in the negative.

All of which is most respectfully submitted to the house of representatives, by

ETHER SHEPLEY,
JOHN S. TENNEY,
SAMUEL WELLS,
JOSEPH HOWARD,
J. W. HATHAWAY,
JOHN APPLETON.

My concurrence extends to the answers to questions one, two, three, five, and to the first interrogatory of question four, and to such part of the opinion as gives less than a majority full power to do all necessary acts to complete the senatorial board, but not to the full extent of powers indicated in the opinion.

JOHN APPLETON.

Not having been able to meet and confer with my associates in the consideration and adoption of the foregoing opinion, I have examined the same, and concur in the answers to the *fourth* and *fifth* questions, but not in all the reasons stated for coming to such conclusions. I do not concur in the answer to the *third* question, nor to so much of the answer to the *first* question as states that the members of the house may rightfully refuse to meet those senators who have been elected to elect others by joint ballot. To the *second* question, I answer that the provisions of the section referred to, do *authorize* a convention in the first instance for the purpose of filling a part only of the vacancies existing in the senate on the first Wednesday in January.

RICHARD D. RICE.

OPINION OF JUDGE RICE.

To Hon. LUTHER S. MOORE,

President of the Senate of the State of Maine:

THE undersigned, in response to the order of the senate, dated January 30, 1854, presents some of the considerations for the answers by him returned to the questions propounded by the house of representatives, January 18, 1854, to the justices of the supreme judicial court, and the reasons for his non-concurrence with a majority of the court in all the answers by them returned.

The powers of our government, conferred by the constitution, are, primarily, divided into three distinct departments—the *Legislative*, *Executive*, and *Judicial*. These departments are severally entrusted with certain specified powers which they are required to exercise, each for itself, entirely independent of the other. The powers confided to these departments, are in many instances, subdivided and distributed among different *branches*, and upon these branches are conferred powers, to be exercised, sometimes in concurrence with each other, and in other cases, by independent action; thus constituting a government, at once free, and so regulated by checks and balances, arising out of the distribution of its powers, as to prevent precipitate and inconsiderate action, in times, when by reason of excitement, single bodies, acting under a common impulse, may be in danger of running into error.

Though our government is thus complex in its form, with important powers confided to the independent action of its different departments, and the different branches of those departments, yet there are in it no conflicting powers, but the legitimate action of the whole will be found to be entirely harmonious. Thus, when a power is conferred upon a department, or branch, to be by it exercised independently, the exercise of that power is, either by distinct provision, or by necessary implication, withheld from all others.

In the construction of provisions of the constitution, which may appear ambiguous, regard should be had to the general scope and object of the whole instrument, and when it is doubtful to which department or branch, the exercise of an independent power belongs, it should be assigned to that, by which, from its character, it can be most appropriately exercised.

These considerations being kept in view when cases of apparent conflict arise, will always afford a safe rule of interpretation.

The legislative power of the government is vested in two distinct branches, a house of representatives and a senate, each having a negative upon the other. Some of the powers conferred on these branches, are common to both, and are to be exercised in concurrence. Others are confided to the separate action of each, and are to be exercised by each, with absolute independence of the other.

Prominent among the latter, stands the provision, in the third section of part third, article fourth, which declares that "each house shall be the judge of the elections and qualifications of its own members." This provision, so far as the senate is concerned, may be deemed rather declaratory of existing rights, than as conferring new powers. Section five, of article four, part second, confers upon the senate the power to "determine who are elected to be senators, by a majority of the votes, in each district," and as a necessary correlative, who are not elected, or rather, in what districts, if any, vacancies exist.

In the same class of independent powers, is found the power of the senate to try all impeachments, and of each house to choose its own officers; to compel the attendance of absent members; to determine the rules of its proceedings; to punish its members for disorderly behavior; to keep a journal of its proceedings; to punish persons not members for disrespectful or disorderly behavior in its presence; or for obstructing any of its proceedings; or for threatening, assaulting, or abusing any of its members for any thing said, done, or doing in either house.

These powers can only be exercised by each house, according to its discretion, and neither has the right to exercise them for the other, or in any way to dictate the manner in which they shall be exercised by the other. All of them may be exercised when a majority of members, or a quorum for doing business is in attendance, and many of them when less than a quorum is present.

The result of the possession of these independent powers is to authorize each branch, or house, to perfect its own organization. To the house, this power, in its fullest extent, has never been denied, or questioned. It is a power, incident to, and inherent in all independent deliberative bodies, founded upon the most universally recognized principles of parliamentary law.

Article fourth, part second, section fourth, provides, that the governor shall issue a summons to such persons as appear to be elected, to attend and take their seats.

Like the credentials of the members of the house, the "summons" of the governor is prima facie evidence of election, and authorizes those who "appear to be elected," in the first instance, to take their seats as members of the senate.

These members, when assembled, the fifth section recognizes as "the senate," and confers upon it the power, and imposes the duty, to

determine who are elected by a majority of the votes, to be senators in each district. This section also contemplates that vacancies may be found to exist, and makes no distinction in the power of the senate, dependent upon the number of those vacancies, but in all cases where vacancies exist, the duty of the senate and the mode of its procedure in effecting its organization are the same.

It has been supposed that the power to act, does not exist, on the part of the senate, unless a majority of its members appear to be elected, and shall have been summoned by the governor. This opinion is based upon that clause of section third, part third of article fourth, which declares that "a majority shall constitute a quorum for the transaction of business."

In construing particular provisions of the constitution, care should always be taken to observe the connection in which they occur. Part second, of article fourth, treats of the election and qualification of senators, and the *organization* of the senate. Part third, of the same article, treats of the "legislative power" after both branches have been duly organized and are in a condition to act as a legislature; and the clause referred to, as limiting the power of the two houses when less than a majority is present, is manifestly intended to apply to the transaction of that kind of business incident to legislation. Any other construction would be liable to obstruct and wholly prevent the organization of the senate, even when a majority appeared to have been elected, and had been summoned by the governor. An examination of the returns, or other evidence, might disclose errors which would compel the senate to determine, that only a part of those who had been summoned, less than a majority, had actually been elected. Under the construction contended for, that body would thereby be rendered powerless, unable to proceed, and that branch of the legislature be practically dissolved. The same result would follow when less than a majority were "summoned" by the governor.

The constitution is not justly chargeable with any such self destructive principles. It contemplates a government continuous and permanent in its character, and as the various instruments by which it is carried forward decay, or pass away, it will be found to contain vital energies and recuperative principles sufficient, under all circumstances, to reproduce others, of a similar character, in endless succession.

The senate has the power, when organized, and when a quorum is not present, to compel the attendance of absent members. There is no good reason perceived, why the same power should not exist before it has perfected its organization. Indeed it may be necessary that it should then possess that power to enable it to effect this object. That power has been supposed to authorize a senate composed of less than a quorum to compel the attendance of those whom it may determine to be elected, whether they have been duly qualified to act as members or not. This would seem to extend that power beyond its legitimate limits. The "members" whose attendance may be rightfully coerced,

are those who have not only been elected *to be* senators, but who have actually *become* such, by taking upon themselves the prescribed oaths of office, by which they are qualified to *act* as members of the senate.

Should it be said that if this power, to its fullest extent, be denied to minorities, factious men may be enabled to prevent the organization of that branch of the legislature, and thus all constitutional government be destroyed, the answer is that the same result may be effected, by resignation, revolution, or usurpation. But the constitution, relying upon the intelligence and patriotism of our people, contemplates no such contingencies. When the time shall arrive in which citizens cannot be found, who are willing to assume the official trusts required by the constitution, and when they shall, with one consent, abjure all official station, then may we pronounce the experiment of maintaining a free government to be "a failure." It is believed no such unfortunate contingency is now apparent.

If these positions are correct, then it follows that those who "appear to be elected" and who are summoned by the governor, whether more or less than a majority, constitute "the senate" within the meaning of the constitution, with powers sufficient to perform all those acts which are necessary to perfect the organization of that body as a branch of the legislature. These powers are derived from distinct constitutional provisions,—they also would arise by necessary implication from the fact that the senate is an independent, co-ordinate branch of the government, if the constitution were silent upon the subject.

The fifth section provides that "the senate shall, on the said first Wednesday of January annually, determine who are elected by a majority of votes to be senators in each district," and further provides the manner in which existing vacancies shall be supplied. This provision undoubtedly contemplates that the "determination" shall be made on the said first Wednesday of January annually. But the contingency is also contemplated by the constitution, in which all the vacancies may not be filled, on that day; as section four, of article nine, provides, that "in case the elections, required by this constitution on the first Wednesday of January annually, by the two houses of the legislature, shall not be completed on that day, the same may be adjourned from day to day until completed."

There is no provision in the constitution, wherein the order of time in which the senate shall determine who are elected in each district is prescribed, nor is there any express provision requiring the senate to determine who are elected, in *all* the districts, before vacancies shall be supplied, by election, in *any*. If any such necessity exists, it must arise by implication, and not from any positive command in the constitution. The language used is suggestive of separate action. The senate is to determine who are elected in *each* district.

Practically, the construction that all must be acted upon at the same time, might lead to very serious inconvenience. Thirteen members

only, of the present senate have been summoned by the governor, leaving, apparently, eighteen vacancies. Suppose of these eighteen apparent vacancies, seventeen are indisputably such, and one only is contested. This contested seat may involve an inquiry into the legality of the proceedings, and the qualification of voters, in every town and plantation in the contested district. To determine the question of election or non-election in such a case, must, necessarily, consume much time. Now must the seventeen undisputed cases be suspended, for an indefinite period of time, and the state deprived of the services of a majority of the members of the senate, and that branch of the legislature paralyzed, because the right to one seat is contested—and that, too, when the facts involved in the contested case in no wise affect the others? This case is put hypothetically for purposes of illustration. A construction leading to such results should not be adopted, unless dictated by the plain requirements of the constitution, or from the most stringent necessity.

But it has been suggested, that if such a contingency should arise, the two branches might, to obviate such results, proceed with the election in the undisputed cases, by agreement. To hold that the organization of one branch of the legislature, in any case, depends upon the voluntary agreement of the other, would be to destroy its independence, and subordinate it to the will if not to the caprice of the other. Such is not the intention of the constitution. If the senate is imperatively required by the constitution to determine who are elected, or who are not elected, in all the districts, before any vacancies can be supplied, it is not perceived on what principles a part only of those vacancies can be filled by the two houses without a violation of that instrument. I know of no authority on the part of the two houses to waive the positive requirements of the constitution, by agreement, or otherwise. Any such agreement would be simply void, and no legal rights could be acquired under it.

In 1851, fifteen senators were summoned by the governor. Those senators appeared, were qualified, and took their seats, May 14, 1851. A committee was appointed, to whom the returns of votes for senators were referred. On a subsequent day that committee reported that the fifteen members (those summoned) were elected "*as appears by the returns*," and further reported sixteen existing vacancies. This report was accepted by the senate, and the vacancies were filled by a convention of the members of the two houses. Honorable Jeremiah Fowler, of the eighth senatorial district, was one of the fifteen declared to be elected as above, but his right to a seat was contested. The subject was referred to a committee of the senate. A protracted examination was had, both before the committee and in the senate. The legislature adjourned from June to January following, and it was not until the 24th of February, 1852, that the senate finally *determined* by a vote of fourteen to twelve, that Mr. Fowler was constitutionally elected. [*Senate Journal*, 1851-2.]

In 1843, the governor summoned twenty-two senators, who appeared and were qualified on the fourth day of January of that year. The senatorial votes were referred, on that day, to a committee. On the sixth day of the same month, the committee reported, *in part*, excluding the fourth (Kennebec) district, declaring twenty-two members, including one from Penobscot, who had not been summoned by the governor, to be elected. The committee also reported six vacancies, which were filled, by election in convention of the members of the two houses, on the afternoon of the same day. In the fourth senatorial district, one senator only (Mr. Smiley) had been summoned by the governor. The election of all the members in that district was contested. On the eleventh day of that month, the committee made an additional report, accompanied by a resolution, in which it was determined that John Hubbard, Jacob Main and David Stanley were constitutionally elected, thus excluding Mr. Smiley. This report was accepted by the senate by a unanimous vote. [*Senate Journal*, 1843.] In view of this practical construction which has been put upon the constitution, by the senate, and acquiesced in by the house, at times when they could not be supposed to have been influenced, in this particular, by any improper motive, and in view of the fact that the senate has the power distinctly conferred upon it to determine who are elected, and necessarily when vacancies exist, and from the considerations already referred to, it would seem to follow as a legitimate consequence, that it is authorized to determine the order of time in which it will act, as matter of discretion. But in this, as in all other matters of discretion, it must act upon its official responsibility.

The same result would also follow from the familiar principle that when a general power is conferred, it carries with it, as an element, discretion as to its exercise, unless the manner in which it is to be exercised is specifically provided.

If, then, the senate may, in its discretion, determine the order of time in which it will report existing vacancies, a corresponding obligation would seem to rest upon the house to concur in filling those vacancies—otherwise that conflict would arise in the exercise of powers, independent in their character, which the constitution does not contemplate.

The fifth section, before referred to, provides, "in case the full number of senators to be elected from each district, shall not have been so elected, the members of the house of representatives and such senators as shall have been elected, shall, from the highest numbers of the persons, voted for, on said lists, equal to twice the number of senators deficient, in every district, if there be so many voted for, elect by joint ballot the number of senators required."

It has been suggested that the language, "such senators as shall have been elected," is applicable to such only as have been elected by the voters at the polls. This construction is supposed to be favored by the peculiar collocation of the words in that section. But when

the concluding clause of the same section is considered: "and in this manner all vacancies in the senate shall be supplied, as soon as may be, after such vacancies happen;" and when it is further considered that no inequality of right or power exists among the members of the senate—that a senator elected by a convention of the members of the two houses, is, when duly qualified, clothed by the constitution with all the powers, and invested with all the rights which pertain to the office of senator, it is not perceived on what principle he can be excluded from a participation in filling any vacancies which may exist, without reference to the time or manner in which they may have occurred.

While this construction does no violence to the language of the constitution, it preserves the just rights, and essential equality, of all the members of the senate. This is also the practical construction, which it is understood has been put upon a similar provision in the constitution of Massachusetts, by the legislature of that state now in session.

These considerations, so far as they do not lead to concurrence with opinions already expressed by my learned associates, are advanced with great diffidence; but they have brought my mind to the following conclusions, as indicated in a note appended to the opinion of a majority of the court, addressed to the house of representatives:

First. That if a majority of the whole number of senators required by law are elected, and the senate duly organized, the provisions of section fifth, article fourth, part second, of the constitution contemplate, but do not require, that the senate shall determine who are elected to be senators in all the senatorial districts before the members of the house and such senators as shall have been elected, proceed to elect, by joint ballot, the number of senators required. The rule is not imperative.

Second. That the provisions of that section authorize a convention, in the first instance, for the purpose of filling a part only, of the vacancies existing in the senate, on the first Wednesday of January.

Third. That a senator elected by the members of the house of representatives and such senators as shall have been elected, to fill a vacancy existing on the first Wednesday in January, is entitled, when duly qualified to act as a senator, to vote in a convention, held for the purpose of filling other vacancies in the senate, existing, but which had not been filled, on said first Wednesday in January.

And I fully concur with the majority of the court in their answers to the fourth and fifth questions.

All of which is respectfully submitted.

RICHARD D. RICE.

AUGUSTA, January 31, 1854.

OPINION OF JUDGE APPLETON.

BANGOR, February 11, 1854.

SIR:—I received, yesterday, a communication from a committee of the honorable senate, informing me of the request of that body, that I should furnish them with my opinion in full, upon the questions recently submitted to the justices of the supreme judicial court, by the house of representatives. In compliance with their expressed wish, I have the honor to present the following considerations:

The constitution of Maine in article four, part two, section five, provides for the filling of all vacancies existing in the senate on the first Wednesday of January, and for those which may subsequently arise.

This section provides for two things to be done, and for the order of time in which they shall be done. What is last to be done, is consequential upon the performance of that which is first to be done, and it cannot be accomplished, till that which precedes it in the order of time shall have been determined.

The provision as to what is first to be done is in these words:

"The senate *shall*, on the said first Wednesday of January, annually, *determine* who are elected by a majority of votes to be senators *in each district*." The natural and obviously occurring meaning is that *all* elections should be then determined, for if this be not done, they will not have been determined in *each* district, which this branch of the section requires—the object being at the same time to ascertain all vacancies in each district. The meaning of the word *each* is not satisfied, and the idea indicated is not answered by a determination in less than in *each* district.

The section then proceeds as follows:

"And *in case* the *full* number of senators from *each* district shall not have been so elected, the members of the house of representatives and *such* senators, as shall have been elected, *shall*, from the *highest* numbers of persons voted for on said lists, equal to *twice* the number of senators deficient in *every* district, if there be so many voted for, elect by joint ballot the *number of senators required*." The subsequent action required in this clause, involves and presupposes the ascertainment of certain facts. It is only "*in case* the *full* number of senators to be elected from *each* district shall not have been *so*

elected," that any subsequent action is to be had. It is not in case it is determined that part of the "senators to be elected from *each* district" shall not have been so elected, that the constitution requires anything to be done. If "the members of the house of representatives and such senators as shall have been elected," should go into convention with a partial determination of vacancies, by and under what portion of this section is such action commanded or required? It can only be by a construction by which *the full number* may be held to mean any portion of the full number—and by which the vacancies in *each district* may be held to mean the vacancies in part of the districts.

The election is to be made "from *twice* the number deficient in *every* district," and "the number of senators required" is to be elected. Twice "the number of senators deficient in every district" is not twice the number deficient in part of the districts, nor is "the number of senators required" a part or parts of such number. If *all* vacancies are not ascertained, if "twice the number of senators deficient in *every* district" be not determined—it will be impossible to do what this section requires—that is, supply "the deficiency in *every* district," for it will not have been ascertained—nor to elect "the number of senators required," for in such event "the number of senators deficient" will not have been determined. It is only "*in case the full* number of senators to be elected from *each* district shall not have been *so* elected," and "twice the number of senators deficient in *every* district" shall have been determined "from the highest numbers of the persons voted for on said lists," that the constitution commands that there *shall* be an election and that the duty to obey arises as a constitutional obligation.

The electing body is described as composed of "the members of the house of representatives and *such senators as shall have been elected.*" Such senators as shall have been elected? When? To what time does this refer? Most manifestly to the first Wednesday of January. It can refer to no other period of time. It follows then that one elected in this mode is not and could not have been referred to as constituting one of the electors, for he would not have been a senator at the time referred to, and his senatorial rights would have arisen from the very election contemplated in this section.

The last clause provides that "in this manner all vacancies in the senate shall be supplied *as soon as may be* after such vacancies happen." The preceding portion of this section refers to vacancies existing *on* the first Wednesday of January. This relates to vacancies happening after this time, as by death, resignation or in any other mode, and provides that the manner in which they shall be filled shall be the same, as in case of vacancies existing at the time of the first meeting of the senate.

Other and different provisions might have been made, and they might or might not have been more convenient. The true inquiry is as to

the meaning of the words used. In the construction here presented, the plain and natural meaning of the words used, has been regarded. From the report accompanying the questions proposed by the house of representatives, it appears that "it has been the uniform usage in this state, since the formation of the government, to determine and declare all vacancies, existing in the senate on the day appointed for the meeting of the legislature in each year," before proceeding to elect, by joint ballot, the number of senators required. An uniform usage of so long continuance, while not conclusive, may yet justly be regarded as no slight confirmation of the correctness of the preceding construction of this section of the constitution.

These views afford an answer to the first three questions of the house.

Either house when first assembled, and consisting of less than a quorum, is obviously not clothed with the powers and cannot exercise the functions of one having a constitutional quorum. But because a quorum has not been elected, or being elected, may not be present, neither the government nor the legislative branches of the government, cease to exist. Every legislative body is necessarily subject to those rules of procedure and is possessed of those powers without which it would be impossible to accomplish the purposes of its existence. The power to punish for contempts, except when committed by their own members, is not given to the house of representatives of the United States, yet it has been judicially determined to exist by the highest tribunal of the Union—as a power necessarily derived from implication. The first congress under the constitution was held at New York, on March 4, 1789, but a quorum not being present, the house met and continued its existence by successive adjournments till the first of April, when a quorum having taken their seats, the election of its officers took place. A quorum of the senate was not had till April 6, when a message was sent to the house, informing them of that fact, and that a president had been elected for the sole purpose of opening and counting votes. During this time a journal was kept—the bodies thus assembled were respectively termed the house or senate—and their legislative existence had relation back to the day of their first meeting. That a legislative body, when less than a quorum, may organize so far as may be necessary to call that body into existence—that it may continue its existence by successive adjournments—that it may keep a journal and record its proceedings—that it has the power of self-protection incident to all legislative bodies—that when a quorum is had, it then becomes possessed of full legislative power—that its legislative existence relates back to the date of its temporary organization—and that during all this time it is entitled to its appropriate designation as senate or house as the case may be, cannot be doubted. Thus much is necessary by the law of self-preservation inherent in all legislative bodies, and is believed to have been sanctioned by universal usage.

Whether the senate has or has not further power, is to be ascertained

by recurring to article four, part two, which relates to the senate and its organization, and provides for the development of its organic number in case of vacancies arising from failure to elect.

Before examining the sections of the constituion bearing on the remaining questions presented, certain considerations resulting from the views already presented, obviously occur. The theory of the constitution contemplates a full senate—and the first duty imposed on the senate relates to the filling of all vacancies existing on the day of its meeting, without regard to their number, whether many or few. The full number of legislative bodies is ordinarily obtained from without as by popular elections. The mode by which the senate is filled is peculiar and anomalous, the initiatory steps to obtain a full senatorial board arising from within its own body and its full number is the result of an election by an electoral body, of which its own members constitute a part. Each house is the judge of the election of its members, and no power is given to either house to judge of the election of the members of the other. The ascertainment of its condition—the preliminary steps necessary to the development of its constitutional number, are given to the senate as a part of its organizing power and for the purposes of its organization.

The question then arises, whether those powers can be exercised by less than a quorum.

By article four, part two, section three, the lists of votes for senators, duly attested, are required "to be delivered into the secretary's office thirty days at least before the first Wednesday of January." The next section provides, that the governor and council, after examining "the returned copies of such lists," shall "issue a summons to *such persons as shall appear to be elected* by a majority of votes in each district, to attend that day and take their seats."

The persons who appear to the governor and council from the lists to be elected as senators, and who attend and "take their seats," as such, without regard to their number, are, immediately on taking their seats, and before any addition can be made to their number, denominated "the senate" by the fifth section. The senators, thus summoned, whether few or many, are "to take their seats"—that is, assume the functions of senators. They each form a part of the senate. They are senators, in fact, and of right. The section then declares that the senate—that is, that those thus summoned, "shall determine who are elected," &c. No negative words restricting the power of those thus summoned are to be found. The object to be obtained, is a full senatorial board by the action of those who *appear to be elected,* and have been summoned and taken their seats. The powers of each branch are separate and distinct. The power of determining vacancies is given in express terms to the senate—that is, to those thus assembled. It is not given to any other branch of the government, and resort should not be had elsewhere, unless under the pressure of the most urgent necessity. No such necessity exists.

The conclusion is, that the constitution contemplates a full senate—that it recognizes less than a quorum as a senate, and as clothed with limited powers—that they may determine vacancies—give the house the necessary information of their existence, and co-operate with them in completing the senatorial board. These powers are necessary to the complete organization of the body. In other respects, the senate, when having less than a quorum, and in the process of completing its number, is equally with the house subject to the general infirmity of power incident alike to each branch of the legislature when in that condition.

Article four, part three, relates to "legislative power," and embraces both the power of general, as well as of that particular legislation, which is to be exercised by each house in providing penalties by which to compel the attendance of absent members, or to determine its rules of proceedings, &c.

The third section of article four, part three, provides that "each house shall be the judge of the *elections* and *qualifications* of its own members, and that a majority shall constitute a quorum to do business." This section presupposes that each house has had a quorum, and has been organized, and in possession of full "legislative power." In terms, it applies to each house, and to those who have become members in any mode provided for in the constitution. It recognizes the power of adjudication of the election of members, and of their qualifications,—a power essential and important to every legislative body as a part of the legislative duty of each house. After a full house, or its constitutional equivalent, a quorum, has been had, and the house has been organized, can less than a quorum judge of the election and qualification of its members? If so, they can do more than adjourn, and they must have this power only because it is no part of the business of the house. If they cannot do this, after the house or senate has had a quorum and been organized, it is difficult to perceive how a body in the process of procuring an organization, can with less than a quorum conclusively bind by its determinations the same body, when its full number shall have been obtained; in other words, that a minority of the senate can have greater powers while adopting the necessary proceedings to procure its full number, than the same number would have after the senatorial board shall have been completed. If less than a quorum, while organizing, have this power, to determine conclusively, and forever bind the senate when complete in its numbers, they must have it equally whether such condition is the result of absence or failure to elect.

It is obvious, that if to "determine who are elected," is to have the same force and effect as the phrase "shall be the judge of the *election and qualification* of its own members"—if the powers of a senate, when its numbers are complete, are to be forever concluded by the action of less than a quorum, while in the process of completing its numbers,—in the present case the power of the senate to judge will in advance have been taken from it, even before by the constitution the

right to exercise it will have existed. If this power exists in less than a quorum, while completing its numbers, it must exist equally whether arising from absence or failure to elect; and a senate, when complete in its numbers and organization, will enter upon the discharge of its duties shorn of its power to judge of membership and qualifications.

Such a meaning, if possible, must be given to each part of the constitution as will give the fullest scope to the general intention of the instrument, and as will least conflict with its particular provisions. The senate has power to "determine." "Each house shall be the *judge* of the elections and qualifications of its own members." It is a determination for the purpose of procuring a full senate, and is to be regarded as part of its organizing power. It is to be limited to the purpose in view. This limitation of meaning is further strengthened by the marked difference of phraseology in these two forms of expression. One not constitutionally a candidate, as an alien, may be elected and take his seat, and exercise the functions of a senator; and yet because not possessing the constitutional qualifications his seat may be vacated. The words used in these sections differ; the purposes for which they are used are different, and the force and effect to be given to them should be in conformity with the objects to be attained in each case. A determination for immediate action in the one case—a final and conclusive judgment in the other.

The senate in the first instance, is composed exclusively of those "*who appear to be elected.*" The completion of its full number is the first official duty imposed upon it by the constitution. The time and delay incident upon investigating cases of contested elections could hardly have been contemplated in reference to an act, which, if practicable, is required to be done on the first day of its official existence. The determination would rather seem to be one to be based on existent materials—already in the archives of the state, and not upon the contradictory testimony of witnesses both as to elections and *qualifications* hereafter to be had—and after the delay incident to a protracted examination of complicated facts in an indefinite number of cases. The evidence upon which the senate would be authorized to decide, would seem to be the "returned copies of such lists," from which "the highest numbers of the persons voted for" is to be obtained.

These conclusions, for aught I can perceive, are inevitable, unless the "determination" of less than a quorum is to be held conclusive upon the senate when filled—a result, which would deprive it of one of its powers clearly granted, most essential and necessary and to which I am not prepared to assent.

I have the honor to be,
Very respectfully,
Your obedient servant,

JOHN APPLETON.

Hon. Luther S. Moore,
President of the Senate of Maine.