ACTS AND RESOLVES

OF THE

FIFTY-FIFTH LEGISLATURE

OF THE

STATE OF MAINE.

1876.

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1876.

OPINIONS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT.

UPON QUESTIONS PROPOSED BY THE EXECUTIVE COUNCIL.

"ORDERED, That the opinion of the Supreme Judicial Court be requested on the following questions:

First. In the discharge of their duties as canvassers of lists of votes returned to the office of Secretary of State as required by law, can the Governor and Council include in the number of votes for William H. Smith, for example, such other votes for the same office as are for W. H. Smith?

Second. Can the Governor and Council include in the number of votes for William H. Smith, for example, such other votes for the same office as are for William Smith?

Third. When the Selectmen and Clerk of any town make a return of lists of votes given in, in such town, showing that William H. Smith and W. H. Smith received votes for the same office, and accompany and seal up with such return a certificate which satisfies the Governor and Council that William H. Smith and W. H. Smith are one and the same person, can the Governor and Council count the votes for W. H. Smith as for William H. Smith?

Fourth. Can the Governor and Council receive evidence showing that the return of votes cast in any town for Senator or Representative to the Legislature, does not agree with the record made by the Clerk of such town, and allow the return to be so amended?

Does a person elected to fill a vacancy in the office of Register of Deeds, hold the position only for the remainder of the term for which the prior Register was chosen, or for a full term of five years?"

The Court responded to the order in the following opinion:

BANGOR, December 6, 1875.

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

The Governor and Council in comparing and examining the returns of votes and in declaring who are elected act as a canvassing board. They only know what the returns indicate. In their investigations they are limited to the evidence derivable from the returns transmitted to them by the several Clerks of the cities, towns and plantations of the State, except when their powers have been enlarged by statute. If the returns show that ballots were cast for John Smith and for J. Smith for the same office, it cannot be ascertained from any evidence before the canvassing board that the initial letter of the christian name J. was intended for John rather than for Joseph or James or any other christian name beginning with such letter, which different persons bearing that common surname may have. So, if John Smith and James Smith were respectively candidates for the same office, no inspection of the returns however accurate would afford any clue to enable the Governor and Council to determine whether the vote for J. Smith should be counted for the one or the other of the contending candidates, or for some other Smith whose christian name began with J. The fact of different ballots would indicate that there were different individuals for whom such ballots were intended.

When there are abbreviations of the christian name in common and ordinary use, as Wm. for William, it is otherwise, for these abbreviations have a recognized and well understood meaning. So, when the name is mispelled but recognizable by the sound as that of a candidate the mispelling cannot lead to any misunderstanding, the recognition of identity from the record will justify the counting the name mispelled for the candidate for whom it was obviously intended.

So far as this question relates to the returns of votes for Senators and Representatives, it is comparatively unimportant, as the Senate and House of Representatives are the constitutional judges of the election of the members of their respective bodies, and have full power to receive and act upon the evidence necessary to enable them justly to determine the rights of the different claimants for the same seat. In the case of county officers the will of the voters may sometimes be defeated by their negligence in not designating with sufficient precision the names of their candidates. In respect to those officers the powers of the Governor and Council have been increased to a limited extent by R. S. c. 78, § 5. Whether a further enlargement of their powers may not be expedient is a matter for the consideration of the Legislature.

To the first question proposed, we answer in the negative.

2. The names of William H. Smith and William Smith are different. The ballots respectively bearing those names were cast

by different persons, and they are returned as the names of different candidates. Evidence from without the returns would be necessary to show that they were intended for the same person. But such evidence is not legally admissible.

The second question we answer in the negative.

3. By the tenth amendment to the constitution, it is provided that "fair copies of the lists of votes shall be attested by the selectmen and town clerks of towns and the assessors of plantations, and sealed up in open town and plantation meetings; and the town and plantation clerks respectively shall cause the same to be delivered into the Secretary's office thirty days at least before the first Wednesday of Jauuary annually. And the Governor and Council shall examine the returned copies of such lists, &c., &c., and twenty days before the said first Wednesday of January annually shall issue a summons to such persons as shall *appear* to be elected by a plurality of all the votes returned, to attend and take their seats," &c.

By R. S. c. 4, § 33, the town clerk is required to transmit to the Secretary of State within a prescribed time "the returns of votes given in his town."

When the selectmen and town clerks of and the assessors of plantations attest "fair copies of the lists of votes," and seal up the same "in open town and plantation meetings," and cause the same to be delivered into the Secretary's office as required by the constitution and the statutes, their duty is at an end. They are not certifying officers as to the identity of candidates when that identity is not apparent from the returns transmitted, for the reason that the constitution has not made them such.

We answer the third question in the negative.

4. By R. S. c. 78, § 5, the power of the Governor and Council is somewhat enlarged in relation to the election of County Commissioners, and the provisions of this act have been made applicable to other county officers. But this act gives no power to correct the errors, which may exist in the returns of votes of Senators. It is for the Senate to see that such errors as are supposed to exist in and by this inquiry are duly corrected.

The fourth question we answer in the negative.

5. By R. S. c. 7, § 2, it is enacted that "in each county and in each registry district established by law, there shall be chosen by ballot by such persons as are qualified to vote for Representatives at town meetings, on the second Monday of September in the year one thousand eight hundred and seventy-two, *and every five years thence* following, some person to be Register of Deeds."

By § 3 the person so chosen is to "hold for the term of five years from the first day of January thereafter, and until another shall be chosen and qualified."

By § 5 "vacancies occurring in said office by death, resignation or otherwise, shall be filled by election * * at the September election next after their occurrence; and in the meantime the Governor, with the advice and consent of the Council, may fill said vacancies by appointment, and the person so appointed shall hold his office until the first day of January thereafter."

It is apparent that the term of office of the Register of Deeds was five years—that the elections were to be made every five years from a specified date—and that they were to be simultaneous throughout the State. So they ever have been. It follows that a vacancy to be filled by election could only be for the remainder of the term, as otherwise the election could not be "in each county and in each registry district established by law" * * every five years *thence* following—that is, "from the second Monday of September, 1872." Any other construction permits the choice of the register to be in any one of the intervening five years, and not in the five years *thence* following in consecutive series of that period.

That this is the true construction of the statute is made apparent by recurrence to preceding legislation. By St. 1821, c. 98, § 1, the register of deeds is to "hold his office for the term of five years, and until some other person shall be chosen and qualified to act in his place." In case of vacancy by § 5 the person chosen to fill such vacancy "shall be Register of Deeds for such county, until the time appointed by this act for the election of Register of Deeds throughout the State." The time appointed for such election is by § 1 "at the town and plantation meetings, on the second Monday of September, in the year of our Lord one thousand eight hundred and twenty-one, and *every five years thence following.*" In the revision of 1840 and in every subsequent revision the election of Register of Deeds is to be on a particular day and "every five years thence following."

The practice from the first organization of the government has been to choose the registers of deeds every five years throughout the State. In accordance with the views already expressed it was held by this court in Rose *vs.* County Commissioners, 50 Me. 243, that the elections for this office were to be holden in 1857 and in every five years thence following.

Nor is any thing here advanced at variance with the construction given to the sixth article of the constitution as amended by the ninth amendment, by which the office of Register of Probate is made elective, 61 Maine, 602. By this amendment, the Registers of Probate are to "hold their offices for four years com-

mencing on the first day of January next after their election" in whatsoever year that election may be. There is no provision prescribing that the general election for that office shall be every four years from a fixed date, but registers are required to be chosen at the September election next after a vacancy and for a term of "four years commencing on the first day of January next after their election."

To the last question, we answer that when a register of deeds is elected to fill a vacancy, the election is only for the unexpired term of the register whose place is thus filled.

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WM. WIRT VIRGIN,
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ARTEMAS LIBBEY.

UPON A QUESTION PROPOSED BY THE HOUSE OF REPRESENTATIVES.

Ordered, That the Justices of the Supreme Judicial Court be required to furnish for the information of this House an answer to the following question:

Has the Legislature authority under the Constitution of the State to assess a general tax upon the property of the State for the purposes of distribution under "An act to establish the School Mill Fund for the support of Common Schools," approved February 27, 1872?

BANGOR, February 9, 1876.

SIR:—To the question proposed by the House of Representatives, we have the honor to answer as follows:

By the constitution of this State, art. 4, part 3, § 1, the Legislature has "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 to that of the United States."

In the constitution, it is declared that "a general diffusion of education is essential to the preservation of the liberties of the people." By its very language, it would seem that the "general diffusion of education" was to be regarded as especially a "benefit" to the people. If so, then the Legislature has "full power"

over the subject matter of schools and of education to make all reasonable laws in reference thereto for "the benefit of the people of this State." The power existing, its reasonable exercise, having due regard to the several provisions of the constitution, is subject only to legislative discretion.

The power of taxation "for the defence and benefit of the people" is limited only by the good sense and sound judgment of the Legislature. If unwisely exercised, the remedy is with the people. It is not for the judicial department to determine when legitimate taxation ends, and spoliation by excessive taxation begins.

Education being of benefit to the people, and taxation being incidental and essential to its successful promotion, the mill-tax, being for educational purposes, must be regarded as constitutional, unless in some other portions of the constitution there be found a clause restricting or forbidding the raising of money by legislative action for educational purposes—thereby limiting the power naturally inferable from § 1, which has been already quoted. The limitation must be upon that section; for the money being raised, there is no where to be found, an express or implied inhibition of the appropriation of money when raised, to educational purposes.

By article 8, "to promote this important object"—education—"the legislature are authorized, and it shall be their duty to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools." But this article is mandatory, not prohibitory.

It imposes duties upon the Legislature. It is affirmative, not negative in its character. The Legislature cannot avoid the discharge of this duty. It cannot constitutionally absolve the towns from making at their own expense suitable provision for this primary and indispensable foundation of all good government. The Legislature are by proper enactments, to require the towns to make suitable provision for the support of public schools, and the towns are, at their own expense, to comply with those enactments. Neither can escape from the performance of their several and respective obligations.

But what is making "suitable provision" by the towns, "at their own expense for the support and maintenance of public schools?" By whom is the amount for that purpose to be fixed? Not by the towns, for if left to them, there would be no uniform and definite rule. The "suitable provision" in such case would be a variable quantity, an indefinite and contingent provision, dependent upon the varying wealth of the respective towns and upon the fluctuating views of their voters, or the majority of their voters. It is manifest that a general law upon the subject is

required. Accordingly, from the first institution of the government to the present day, the general control of schools, and the determination of what shall be a suitable provision by the towns for their support, has been fixed by legislative enactment. In 1821, by chap. 117, § 1, towns were required annually to raise and expend for the maintenance and support of schools therein, "a sum of money, including the income of any incorporated school fund, not less than forty cents for each inhabitant, the number to be computed according to the next preceding census of the State, by which the representation thereof has been apportioned." In the revision of 1840, chap. 17, § 6, the amount required was not to be less than forty cents for each inhabitant, the number to be ascertained as in 1821; but this was to be "exclusive of the income of any corporate school fund, or *of any grant from the revenue or funds of the State*, or of any voluntary donation, devise or bequest, or any forfeiture accruing to the use of the town." In the revision of 1857, chap. 11, § 5, the amount required was not less than the sum of sixty cents for each inhabitant upon the mode of ascertaining the number of inhabitants, and exclusive of other sources of revenue, as in 1840. In the revision of 1871, chap. 11, § 5, not less than one dollar for each inhabitant, to be ascertained as in the two preceding revisions, and subject to the exclusion of all other sources of revenue, whether from the revenue or funds of the State, or from any other source whatever. In 1872 the sum for each inhabitant was reduced to eighty cents.

A "suitable provision" must be one general in its character, and having regard to all the people of the State, in the aggregate. A "suitable provision" is not necessarily a sufficient provision. A sufficient provision must be one adequate to meet the educational demands of the people. It may therefore become necessary to supplement what is a suitable provision by adding thereto what will make it a sufficient one. Have, then, the Legislature the right to do this? There is no express prohibition to their so doing. The right to so do exists by art. 4, p. 3, § 1, and no prohibition to the contrary is to be found in art. 8.

By recurring to the debates of the convention by which the constitution was formed, it will be seen that it was anticipated that State aid was to be granted for the support of schools, in addition to the suitable provision to be required by art. 8, of towns. In considering the question presented for our opinion, the views of the framers of the constitution and the subsequent practical construction of its provisions, are entitled to much weight. Perley's Debates, 206, 207. It will be seen by recurring to the legislature of the State that what was expected to be done was done, and that right speedily.

In 1828, c. 403, "an act providing for the support of education" was passed. By this act twenty townships were to be sold and the avails were to constitute a permanent fund to be reserved for the benefit of primary schools. At the same time, and by the same act, any moneys arising from the Massachuestts claim, so called, after paying the debts of the State, were to be added to the school fund. Now whether the lands of the State, or the moneys of the State are appropriated for the benefit of the primary schools, can make no difference in principle. In either event, the "suitable provision" established by the legislature is supplemented by the funds of the State.

In 1850, twenty-four half townships of the undivided lands of the State were reserved, the proceeds to be "appropriated as a permanent fund for the benefit of common schools."

In 1833, c. 82, with the exception of one thousand dollars for Parsonsfield Academy, the tax on the several banks in the State was "appropriated to the support of primary schools."

It will thus be perceived that a school fund in addition to, and in aid of, the "suitable provision" required by the constitution, derived from various sources, and acquired at different times, was established, almost contemporaneously with the existence of the State, and has continued to the present time. It matters not, whether this fund was derived from the sale of the lands of the State, from taxes on its chartered banks, from State funds already in the treasury, or to be raised by taxation upon the real and personal estate of its inhabitants. Neither does the general expediency of this legislation as regards the well being of schools, nor whether due provision has been made to guard the funds thus acquired from being diverted from the object for which they are raised, affect the question of constitutionality. It is for the legislature to provide the necessary security that the bounty of the State be not misapplied, and to impose sufficient penalty in case of its misapplication.

The tax in question is like that for the support of government. It is for the benefit of the *whole* people. All the property in the State is assessed therefor according to its valuation. All contribute thereto in proportion to their means. It is a tax for a public purpose, not one, by which one individual is taxed for the special and peculiar benefit of another. All enjoy the beneficial results of education, and the better order and government arising therefrom, irrespective of the amounts respectively contributed by each to these most important objects.

All acts of the Legislature are presumed to be constitutional till the contrary is clearly shown. No court will declare an act unconstitutional, when its constitutionality is a matter of doubt

In relation to the question proposed, we answer that the Legislature has authority under the constitution, to assess a general tax upon the property of the State for the purpose of distribution under "an act to establish the School Mill Fund for the support of Common Schools approved Feb. 27, 1872."

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