ACTS AND RESOLVES

OF THE

FIFTY-NINTH LEGISLATURE

OF THE

STATE OF MAINE.

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OPINIONS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT,

UPON QUESTIONS SUBMITTED BY GOV. GARCELON.

To the Honorable Alonzo Garcelon, Governor of Maine:

BANGOR, January 3d, 1880.

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

QUESTION 1. When the Governor and Council decide that there is no return from a city, on which representatives can be summoned to attend and take their seats in the legislature, is it their duty to order a new election; or is it competent for the House of Representatives, if it shall appear that there was an election of such representatives in fact, to admit them to seats, though no return thereof was made and delivered into the office of Secretary of State?

ANSWER. No authority is given to the Governor and Council, when there is no return, to order a new election. When the seat of a representative has been vacated by death, resignation, or otherwise, provision is made by Revised Statutes, chap. 4, secs. 38, 44, 47, for the filling of existing vacancies. By these provisions, whenever the municipal officers, therein mentioned, by any means have knowledge of the death of a representative-elect, or of a vacancy caused in any other way, it is their duty to order a new election. If it appears to the House of Representatives that there was an election of representatives in fact, they should admit them to their seats, though no return thereof was made to the Secretary of State. The representative is not to be deprived of his rights because municipal officers have neglected their duty.

QUESTION 2. Is it competent for the Governor and Council to allow the substitution of other evidence in place of "the returned copies of such lists," as are provided for in article 4, part first, section 5, of the constitution, to enable them to determine what persons "*appear to be elected*" representatives to the legislature "by a plurality of all the votes *returned?*"

ANSWER. This refers to the substitution authorized by the act of 1877, chap. 212. The constitution calls for a return that is regular in essential forms, and which truly represents the facts to be described by it. But much of the constitutional requirement is directory merely. It does not aim at depriving the people of their right of suffrage or their right of representation for formal errors, but aims at avoiding such a result. Where the constitutional requirement has not been fully, or has been defectively, executed by town officers, it is in aid of the constitutional provision to supply the omission or deficiency as nearly and as correctly as may be. Such is the purpose of the statute. It is competent for the Governor and Council to allow an erroneous return, or one that is informal or defective, to be aided and corrected by an attested copy of the record, as by statute provided. The object of the constitutional provisions respecting elections is to furnish as many safeguards as may be against a failure, either through fraud or mistake, correctly to ascertain and declare the will of the people as expressed in the choice of their officers and legislators. Hence the requirement that not only shall the returns be made on the spot, in open town meeting, but a record of the vote shall be made at the same time and authenticated in like manner. If, by accident or willful neglect, there is an error or omission in the return, what can be safer than to refer to the duplicate statement made in the record to correct it? This the statute of 1877, chapter 212, allows to be done. And while the language is permissive, it falls within the well known legal rule, that when public rights are concerned it shall be construed as mandatory—a command clothed in the language of courtesy, so clothed because it could not be doubted that high and honorable officials would unhesitatingly avail themselves of all lawful means to declare the result of an election, according to the actual fact, in obedience to the fundamental princi-

ples of popular government. The Governor and Council are bound by the statute. It is mandatory upon them. It imposes a duty to the public that must be performed. Whether the act referred to contravenes the constitution in allowing oral evidence to be received to show the intention of voters in casting their votes, is a question raised by another part of the statute, which we are not now called upon to consider. If unconstitutional in the latter respect, that would not affect the constitutionality of the other separate and independent provisions.

QUESTION 3. Is a return, signed by less than a majority of the selectmen of a town, or the aldermen of a city, valid within the requirements of the same section?

ANSWER. To this question we answer that while a town may legally elect as many as seven selectmen, the well-known practice is to elect only three, and in such cases a return, to be valid, must be signed by a majority of them; because by no possibility can a less number constitute a legal quorum. But the rule is otherwise with respect to the aldermen of cities. Most of our cities are required by law to have as many as seven aldermen, and none of them, we believe, have less than five. To constitute a quorum it is only necessary to have a majority of the whole number present, and when such a quorum is present a majority of the quorum may do business. Supposing the number to be seven, four would constitute a legal quorum; and three, being a majority of that quorum, could legally act, although the fourth should refuse to join them or should oppose their action. Consequently, if a return from a city, having five or seven aldermen, is signed by three of them, it may be a valid and legal return, because only four may have been present, and, in such a case, three (being a majority of those present), could legally act, although the fourth should oppose their action and refuse to join them. When such a return is laid before the Governor and Council they cannot know, and they have no right to assume, that the return is not valid. It is the duty of the aldermen to be in session and examine the ward returns, compare and declare the votes, and of the clerk to make a record thereof. From that record, a certified copy of which is returned, the law presumes that a quorum of the aldermen was present. The law with respect to quorums

and majorities is correctly stated in 5 Dane's Abridgement, 150, and 1 Dillon's Municipal Corporations, sections 216 and 217. In the latter work it is said that bodies composed of a definite number act by majorities of those present, provided those present constitute a majority of the whole number. Or, to use Mr. Dane's illustration: If the body consists of twelve councilmen, seven is the least number that can constitute a valid meeting, though four of the seven may act,—that is, a majority of the whole must be present to constitute a legal quorum, but a majority of the quorum may act,—and so far as we are aware the law is so stated in substance by all ancient and modern authorities. The rule applicable to such cases is similar to that which applies to our House of Representatives. The whole number of representatives established by law is one hundred and fifty-one. A majority (that is, seventy-six members) constitute a quorum to do business. If there is actually that number present and a majority of them (that is thirty-nine members) vote in the affirmative, a valid law can thereby be enacted or other business transacted. If less than seventy-six members are present, then no legal business can be done, except to adjourn, or compel the attendance of absent members. This is familiar law, and illustrates the principle applicable to the aldermen of cities, and shows how and why a return, signed by less than a majority of the whole number, may be, and so far as the Governor and Council are concerned, is conclusively presumed to be valid. They have no right to go behind the return.

QUESTION 4. Is a return by the aldermen of a city, which does not give the number of votes cast for each person voted for as a member of the legislature, and does not show what persons were voted for as such members, in any one of the several wards of such city, a valid return within the requirements of the same section?

ANSWER. We are not sure that we comprehend the full scope of this question. Our answer will meet all of its supposed purposes. It is immaterial whether the aldermen returned to the Governor and Council the detailed vote of each ward separately, or whether they returned the result of all the votes of all the wards for each candidate together. Either mode is a satisfactory way of reaching the same result.

Substance only is sought for in such matters. Nor is it a material matter that, instead of returning all the names of persons voted for, there is a return of votes as "scattering," provided that, however such votes may be added or subtracted, some candidates or set of candidates appear to be chosen by a plurality of the votes thrown. The Governor and Council cannot officially know, nor have they the right to ascertain, that the votes returned as "scattering" were not actual ballots, with the word *scattering* written thereon. Nor is the election of candidates to be chosen by a plurality of votes to be defeated because the whole number of votes or ballots may be stated erroneously or not stated at all. The constitution contains no such requirement, and the statutory provision requiring it, is entirely unimportant and inapplicable to cases where a plurality of votes elect. It is a well settled rule of construction, that where the general terms of a statute embrace several subjects, but are found to be practicably applicable to some of the subjects and not to others, it is to be construed as embracing those subjects only to which it is practicably applicable.

QUESTION 5. Are returns from towns or cities, which are not attested by the town or city clerk, valid within the same section?

ANSWER. Returns from towns and cities which are not attested by the town, plantation, or city clerk, are not valid. The attestation of the clerk is a pre-requisite to any action of the Governor and Council in counting votes, 68 Maine, 588. If, however, the clerk should be absent, a clerk, *pro tempore* may be chosen, or a deputy clerk may be appointed, under the statute of 1872, chap. 17, and the amendment thereof, by the Act of 1874, chap. 159, and the returns of such clerk *pro tempore* or deputy clerk, are to have the same force and effect as if signed by the clerk.

QUESTION 6. Have the Governor and Council a right to reject returns of the election of members of the legislature, required by the same section, from the officers of towns, which were not made, signed or sealed up, in open town meeting?

ANSWER. The Governor and Council must act upon the returns forwarded to the Secretary of State. If they purport

to be made, signed and sealed up in open plantation or town meeting, they constitute the basis of the action of the canvassing board. No provision is found in the constitution or in any statute of this State, by virtue of which they would be authorized to receive evidence to negative the facts therein set forth. They, therefore, have no such power. The statement of the municipal officers is in that respect conclusive.

QUESTION 7. Is the return of two persons, purporting to be the selectmen of a town, valid and sufficient evidence of the vote of the town, when it appears that there were at the time of the meeting at which the election was had, but two selectmen of that town?

ANSWER. When a majority of the selectmen are absent from a meeting for election purposes, or being present "neglect or refuse to act as such, and to do all the duties required of them, the voters at such meeting may choose so many selectmen *pro tempore* as are necessary to complete the number competent to do the duties," R. S., chap. 4, sec. 20. In case of the death or the removal of all the selectmen, two would be sufficient and competent to act. The inquiry is, "if the return would be valid when there should be but two selectmen at the time of the meeting at which the election was had." If the other selectmen had deceased prior to the meeting, the survivors might act, and their action would be legal. But the canvassing board are to be governed by the returns. Evidence would not be admissible to prove the fact that there were but two selectmen of the town. The Governor and Council cannot officially know that there are only two.

QUESTION 8. Can a person who is not a citizen of the United States at the time, be legally elected or constituted a selectman of a town?

ANSWER. A person not a citizen may be elected or constituted a selectman, so that his official acts bind the town, and are valid so far as affects the public—such an one would be an officer *de facto* and clothed with apparent right. His acts would bind the town. Dane *vs.* Derby, 54 Maine, 95; "An officer *de facto* is one who comes into office by color of a legal appointment or election. His acts in that capacity are as valid so far as the public is concerned as the acts of an

officer *de jure*. His title cannot be inquired into collaterally." The People *vs.* Cook, 4 Selden, 89 : "The precise definition of an officer *de facto*," observes Bigelow, Chief Justice, in Fitchburgh R. R. Company *vs.* Grand Junction and Depot Company, 1 Allen, 557, "is one who comes in by the forms of law and acts under a commission or election apparently valid, but in consequence of some illegality, incapacity, or want of qualification, is incapable of holding the office." Indeed there is an entire unanimity of opinion on this subject in all the States of the Union where this question has arisen, as well as in the courts of the United States. But the fact of alienage is not allowed to be proved. This was determined in the Frenchville case, 64 Me., 589, where it was shown that the clerk was an alien who could neither read nor write the English language, and where almost every conceivable irregularity existed, yet evidence outside of the returns was held inadmissible. Nor would such fact have any effect, if it appeared in and by the return itself.

QUESTION 9. If a ballot has a distinguishing mark, in the judgment of the Governor and Council, such as would make it illegal under the statutes, have they authority to disregard it in their ascertainment of what persons appear to be elected, where it appears by the official return of the officers of the town that such vote was received by the selectmen subject to the objection, and its legality referred to the Governor and Council for decision?

ANSWER. The presiding officers are to determine whether the ballot offered has a distinguishing mark or figure, so that, if rejected, the voter may procure a ballot if he chooses, to which no exception can be taken. But if the ballots have distinguishing marks or figures, it is no part of the duty of the officers of the town to make any report in reference thereto. They should reject the ballot, if offered, when it is within the prohibition of the statute. The statute prohibits the rejection of the ballot, "after it is received into the ballot box." It is then to be counted. The Governor and Council have nothing to do with the question. Their duty is to count the votes, regardless of the fact improperly set forth in the return. They are nowhere constituted a tribunal with judicial authority to determine what shall constitute a distinguishing mark or figure, nor can they legally refuse "to open

and count the votes returned," 54 Maine, 602. When the ballot has once been received in the ballot box, neither the selectmen nor the Governor and Council can refuse to count it.

QUESTION 10. If the names of persons appear in the return, without any number of votes being stated or carried out against them, either in words or figures, is it the duty of the Governor and Council to treat those persons as having the same number of votes as another person received for the same office, and whose name is placed first in the return, if they find *dots* under the figures or words set against such other person's name?

ANSWER. If the ditto marks or "dots" are placed under the figures or words of the first candidate's vote, the return should be counted. Where it appears by the letters or figures in the first line, and by ditto marks or by dots in the following lines, that the same class of candidates received the same vote, there can be no ground for rejection. The word ditto and its abbreviation "do" and the dots or marks that stand for the word ditto are of common use, and have a perfectly well defined meaning, known to persons generally. That meaning should not be disregarded. We answer the question in the affirmative.

QUESTION 11. Have the Governor and Council the legal right to decide what kind of evidence they will receive, and what the mode of proceeding before them shall be to enable them to determine the genuineness of returns required by the article and section of the constitution above mentioned?

ANSWER. We assume that the "genuineness of the return" referred to relates either to the signatures of the officers signing, or to alterations of the return. The Governor and Council have no power to reject the returns on either ground, unless an objection in writing is presented to them setting forth that the signatures of such officers (or some one of them) are not genuine, or that the return has been altered after it was signed. Then notice thereof should be given to all persons interested, and when adjudicating upon the facts, the Governor and Council should be governed in the admission of evidence by the established rules of evidence in accordance with the law of this State. The

witnesses should be duly sworn that they may be punishable for the crime of perjury, if they wilfully and corruptly testify falsely. The Governor and Council have no right to reject the return for such cause, without giving the parties interested therein, a fair opportunity to be heard. The genuineness of the return in these particulars is to be presumed, and this presumption remains until overcome by evidence produced as before said.

QUESTION 12. If the Governor and Council have before them two lists of votes returned from the same town, differing materially from each other in the number of votes returned as cast for the same persons, but identical in all other respects, both having been duly received at the Secretary's office, and they have no evidence to enable them to determine which is the true and genuine return, are they required to treat either of them as valid?

ANSWER. When two lists of votes are returned to the office of the Secretary of State by the clerk of any city, town, or plantation, and both are duly certified, the return first received at the office of the Secretary must be the basis of the action of the Governor and Council. If defective, or not a true copy of the record, it can be corrected, or the defects supplied only in accordance with the provisions of the statutes relating thereto.

This government rests upon the great constitutional axiom "that all power is inherent in the people." "It is a government of the people, by the people, and for the people;" and if administered in the spirit of its founders, "it shall not perish from the earth." Its constitution was formed, to use the apt expression of one whose memory is embalmed in the hearts of his countrymen, "by plain people," and "plain people" must administer it. The ballot is the pride, as well as the protection, of all. It is the truest indication of the popular will. The official returns required from the municipal officers of the several plantations, towns and cities, are and will be made by "plain people," and made, too, in the hurry and bustle and excitement of an election. They are not required

to be written with the scrupulous nicety of a writing master, or with the technical accuracy of a plea in abatement. The sentences may be ungrammatical, the spelling may deviate from the recognized standard; but returns are not to be set at naught because the penmanship may be poor, the language ungrammatical or the spelling erroneous. It is enough if the returns can be understood, and if understood, full effect should be given to their natural and obvious meaning. They are not to be strangled by idle technicalities, nor is their meaning to be distorted by carping and captious criticism. When that meaning is ascertained there should be no hesitation in giving to it full effect. The language of Mr. Justice Morton in Strong, petitioner, 20 Pick. 484, is peculiarly appropriate to the subjects under discussion. "What," he asks, "shall be the consequence of an omission by the selectmen or town clerk to perform any of these (their) prescribed duties and upon whom shall it fall? For a wilfull neglect of duty the officers would undoubtedly be liable to punishment. But shall the whole town be disfranchised by reason of the fraud or negligence of their officers? This would be punishing the innocent for the fraud of the guilty; it would be more just and more constant to the genius and spirit of our institutions, to inflict severe penalties upon the misconduct, intentional or accidental, of the officers, but to receive the votes whenever they can be ascertained with reasonable certainty. If no return or any imperfect one can be received, let it be supplied or corrected by the original record, if any there be." The returns should be received with favor and construed with liberality, for, he adds, "from the men that usually are, and of necessity, must be employed to make them, great formality and nicety cannot be expected, and should not be required." The general principle which governs is, that while there should be a strict compliance with the provisions of a statute, yet when they are merely directory, such strict compliance is not essential to the validity of proceedings under such statute, unless they are declared to be therein. This is specially applicable when the rights of the public or of third persons are concerned. The dominant rule is to give such a construction to the official acts of municipal officers as will best comport with the meaning and intention of the parties, as derived from a fair and honest

interpretation of the language used, and to sustain rather than to defeat the will of the people, and thus disfranchise the citizen.

JOHN APPLETON,
CHARLES W. WALTON,
WM. G. BARROWS,
CHARLES DANFORTH,
JOHN A. PETERS,
ARTEMAS LIBBEY,
JOSEPH W. SYMONDS.

OPINIONS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT,

UPON QUESTIONS SUBMITTED BY THE LEGISLATURE, JANUARY 12, 1880.

ORDERED, that the following Statement of Facts be submitted to the Justices of the Supreme Judicial Court, and they be required to give their opinion on the questions appended thereto:

STATEMENT OF FACTS.

Immediately after the annual election of September 8, 1879, copies of the lists of votes cast in the several towns and plantations for various State and County officers, duly attested by the selectmen of towns and assessors of plantations, and by either the town clerk, deputy clerk, or clerk *pro tem*, and like copies of lists of votes given in the several wards of the cities, duly attested by the mayor, city clerk, and a majority of a legal quorum of the aldermen present, were duly returned and delivered into the office of the Secretary of State thirty days before the first Wednesday of January,

1880. The Governor and Council opened these returns Nov. 17, 1879. Application in proper form was made by parties interested for inspection of said returns for the purpose of discovering and correcting any defects or errors therein, but in a large majority of cases such inspection was refused by the Governor and Council, or granted so late and in such manner as to be of no avail for the correction of errors. Senators and Representatives elect made application to the Governor and Council within twenty days after the returns were opened, stating the error alleged, and gave due notice thereof to persons to be affected by such correction, or requested the same to be given, and offered to correct any error found therein by the record, or by substituting for such returns if defective, duly attested copies of the record in such case as provided by Statute, and by offering such other evidence as is authorized by chapter 212 of the laws of 1877, but the Governor and Council refused to receive such evidence or to correct any error in said returns or to receive a duly attested copy of the record to be substituted for any return defective by reason of any informality. Under these circumstances the Governor and Council proceeded to examine the returns with the following results:

The return from the city of Portland was duly signed and showed upon its face all the facts necessary to constitute a legal election. It showed the whole number of ballots given, and that Moses M. Butler, Almon A. Strout, Reuel S. Maxcey, Samuel A. True and Nathan E. Redlon each received over six hundred and forty votes plurality over each of the candidates opposed to them. The only defect alleged to exist in said return was that it contained the words and figures—"Scattering, one hundred and forty-three, 143," but this number if added or substracted or disregarded would still leave each of the candidates above named a large majority of all the votes cast as above stated. The Governor and Council rejected said return, and refused to summon the five representatives above named who were elected, and appeared to be elected by a plurality of all the votes returned, to attend and take their seats, and refused to report their names and residences to the Secretary of State to be included in the certified roll to be furnished by him to the clerk of the preceding house of representatives as required by law. Subsequently to the making of said return, Moses M. Butler, one of said repre-

sentatives elect, died, and in pursuance of the provisions of chapter 4, §§ 38, 44 and 47 of the Revised Statutes, a new election was ordered by the municipal officers of the city of Portland, and at such election Byron D. Verrill was elected by a majority of over one thousand votes over all others, and a proper return was made to the office of the Secretary of State; but no summons was ever issued to said Verrill, and the Governor and Council refused to report his name to the Secretary of State for the purpose above stated. In the city of Lewiston, Liberty H. Hutchinson, Isaac N. Parker and Silas W. Cook were elected by a clear majority of all the votes cast. In the city of Saco, George Parcher; in the city of Rockland, Jonathan S. Willoughby and Theodore E. Simonton; in the city of Bath, Guy C. Goss; were in like manner duly elected representatives. In each of these four cases the returns were in due form and signed by the mayor, city clerk, and three aldermen. The Governor and Council in each of the above cases refused to issue summonses and to report the names and residences of said elected representatives to the Secretary of State to be included in the certified roll. In the Webster, Lisbon, and Durham class, William H. Thomas appeared by the returns to be elected by a majority of eighty-three votes. The returns from said towns were without defect and were duly signed by all the selectmen of each town. Upon rumor that the Governor and Council refused to issue a summons to the person elected because it was alleged that the names of the selectmen signed upon the returns from the towns of Lisbon and Webster were signed by one person in each town, all of said selectmen appeared before the Governor and Council and made oath that the signatures were genuine. In this district another ground taken was, that it appeared from extrinsic and *ex parte* evidence that either the return was not signed and sealed, or the record not made up in open town meeting. The Governor and Council refused to issue a summons to said William H. Thomas, or report his name to be entered on said certified roll, but did issue a summons to Leonard H. Beal, a person who was not elected and did not appear to be elected by said returns.

In the classed towns of which Stoneham is one, A. F. Andrews was duly elected by a plurality of all the votes cast.

There was no defect upon the face of the returns, but the Governor and Council rejected the return from Stoneham without notice to any party, upon *ex parte* affidavit that such return was not made in open town meeting, and refused to issue a summons to said Andrews or report his name to be placed upon the certified roll required by law, but did issue a summons to Osgood N. Bradbury, who did not appear to have received a plurality of votes cast, and who was not elected as matter of fact. In the classed towns and plantations, of which the town of Gouldsboro was one, Oliver P. Bragdon was duly elected by a plurality of all the votes cast. The return of Gouldsboro was read by the Governor and Council as containing the name of Oliver B. Bragdon, although upon inspection of the return it shows that the name written therein was in fact Oliver P. Bragdon, and the summons was refused to said Oliver P. Bragdon and was issued to James Flye, although it appeared upon the face of the return that he did not receive a plurality of the votes cast.

In the class composed of the several towns and plantations of which the town of Weston is one, Frank C. Nickerson was elected by a plurality of the votes cast; but the Governor and Council rejected forty-three votes, appearing by the return of one of said towns to be thrown for Frank Nickerson, and refused to receive a certified copy of the record which showed said votes to be thrown for said Frank C. Nickerson, or correct said return thereby; and refused to issue the summons required by law, and to report his name and residence to be entered on the certified roll above named, but issued a summons to John H. Brown; although had the certified copy of the record been received, and the returns been corrected thereby, said Nickerson would have appeared to have been elected.

In the Cherryfield district Henry C. Baker was elected by receiving a plurality of the votes cast, and it so appeared on the face of the returns which were regular in form; but the Governor and Council rejected the return from the town of Cherryfield, because it was alleged that one of the selectmen signing said return was an alien, and refused to issue a summons to said Baker, and did issue a summons to Lincoln H. Leighton, who did not appear by the returns to be elected, and who was not in fact elected.

In the Farmington district Cyrus A. Thomas received a plurality of all the votes cast, and it so appeared upon the face of the returns; the whole number of ballots in the return of Farmington was 842; the number of votes for Thomas was 437; the number of votes for Lewis Voter was 401; the sum total of these votes is 838; the returns from the Farmington class were in due form. In this district another ground taken was that it appeared from extrinsic and *ex parte* evidence that either the return was not signed and sealed, or the record not made up in open town meeting. The Governor and Council rejected the return from Farmington, and refused to issue a summons to Cyrus A. Thomas, and did issue a summons to Lewis Voter. Voter returned the summons with a letter resigning and declining to act.

The town of Skowhegan gave H. S. Steward 595 votes, and Daniel Snow 302 votes. The return from the town was regular in form, but appended thereto was a protest that the form of the ballots cast for said Steward, and received by the selectmen into the ballot box, constituted in itself a distinguishing mark. The Governor and Council refused to issue a summons to said Steward, and did issue a summons to Daniel Snow.

In the Ashland district John Burnham received a majority of all the votes cast; in the return for Ashland his name was spelled John Burnam; the opposing candidate was Alfred Cushman; the return from Merrill Plantation contained the name of Alford Cushman; the number of votes in the Ashland and Merrill returns was such, that if the Ashland vote had been counted for John Burnham, and the Merrill return for Alfred Cushman, or both had been rejected, John Burnham would have appeared to have been elected. The Governor and Council issued a summons to Alfred Cushman, and refused to issue it to John Burnham.

In the Jay district John R. Eaton received a plurality of all the votes cast, and it so appeared by the returns which were perfect in form. It was alleged that the return from the town of Jay was not signed and sealed in open town meeting, though on its face it purported to have been. The Governor and Council refused to issue a summons to John R. Eaton, but did issue one to James O. White.

In the Newcastle district the return from Newcastle shows that the votes were thrown for E. K. Hall, they being in fact

thrown for Edward K. Hall, as appears by the record, attested copies of which were offered in evidence before the Governor and Council, but which were by them refused. Had this correction been made, Edward K. Hall would have appeared by the face of the returns to have been elected; but the Governor and Council refused to issue a summons to Edward K. Hall, but did issue a summons to James W. Clark.

In the New Sharon district David M. Norton received a clear plurality of all the votes cast, and it so appeared on the face of the returns, which were in due form. It was alleged that the three signatures of the selectmen of the town of New Sharon were in one hand writing. Without evidence, and without notice to any person interested, the Governor and Council rejected the return from this town, and refused to issue a summons to David M. Norton, but did issue a summons to George W. Johnson.

In the Fairfield district A. B. Cole received a plurality of all the votes cast, and it so appears by the returns, which were perfect in form; a second return was made from the town of Fairfield upon a recount, and was marked "amended return." By counting either return A. B. Cole had a clear majority of at least 55 votes; but the Governor and Council rejected both returns, refused to issue a summons to A. B. Cole, and did issue a summons to Harper Allen.

In the Searsport district Robert French received a plurality of all the votes cast, as appeared by the returns which were regular in form. It was alleged that the return from Searsport, when it reached the office of the Secretary of State, was unsealed or not properly sealed. The Governor and Council rejected this return, refused to issue a summons to Robert French, and did issue a summons to Joshua E. Jordan.

In the Lebanon district Isaac Hanscom received a plurality of all the votes cast, and it so appeared by the returns, which were correct in form, with the exception that the town clerk of Lebanon did not sign the return from that town. Attested copies of the record of the town of Lebanon were offered to be substituted for said return for the purpose of amending the same, but the Governor and Council refused to receive said attested copies. Had said attested copies been received it would have appeared by the returns as amended that Isaac Hanscom received a plurality of all the votes cast, but the

Governor and Council refused to issue a summons to Isaac Hanscom, but issued a summons to Stephen D. Lord.

In the Robbinston district Robert M. Loring received a plurality of all the votes cast; but the vote of Robbinston was returned for Robert Loring, instead of Robert M. Loring; the record had the same error, but the ballots had been preserved, and were all for Robert M. Loring. Proof of this fact was offered to the Governor and Council, but they refused to receive such evidence, refused to issue a summons to Robert M. Loring, but did issue a summons to James M. Leighton.

In the Danforth and Vanceboro district, Charles A. Rolfe received a plurality of all the votes cast, and it so appeared on the face of the returns, which were regular in form. The return of the town of Vanceboro was signed by the town clerk *pro tempore*. This return was rejected by the Governor and Council, because signed by a clerk *pro tempore;* they refused to issue a summons to Charles A. Rolfe, but did issue a summons to Aaron H. Woodcock.

In the Exeter-Garland district George S. Hill received a plurality of all the votes cast; the returns were in due form. The Garland return gave the name of George S. Hill in full, and also the name of Francis W. Hill, the opposing candidate in full. The return from Exeter gave the names of G. S. Hill and F. W. Hill. The record of the vote in the town of Exeter bore the names of George S. Hill and Francis W. Hill. A certified copy of the record was proffered to the Governor and Council, which they refused to receive. Had such certified copy been received and the return amended in accordance with the fact, George S. Hill would have appeared by the returns to have been elected. The Governor and Council refused to issue a summons to George S. Hill, but did issue a summons to F. W. Hill.

The facts relating to certain seats in the Senate are as follows:—In Cumberland county, Joseph A. Locke, Andrew Hawes, Henry C. Brewer, and David Duran received a clear majority of all the votes cast, as appears by the returns which were regular in form.

The facts in regard to the city of Portland were the same as already stated, except that the returns showed 34 votes tabulated as scattering. The return from Otisfield omitted to state the whole number of ballots. In the return from West-

brook the vote was given in full, both in letters and figures, opposite the name of Joseph A. Locke, but opposite the names of Andrew Hawes, Henry C. Brewer and David Duran ditto marks were used, both under the letters and figures. The returns of Portland, Westbrook and Otisfield were rejected by the Governor and Council; they refused to issue summonses to Andrew Hawes, Henry C. Brewer and David Duran, and did issue summonses to Daniel W. True, Edward A. Gibbs and William R. Field.

In Franklin county George R. Fernald received a plurality of all the votes cast, and it so appeared by the returns, which were regular in form. The Governor and Council rejected the returns from Farmington, Jay and New Sharon, the facts in regard to which have been hereinbefore stated; refused to issue a summons to George R. Fernald, and did issue a summons to Rodolphus P. Thompson.

In Washington county Alden Bradford and Austin Harris received a plurality of all the votes cast, as appears by the returns which are regular and in due form. The Governor and Council rejected the returns from the towns of Vanceboro and Cherryfield, the facts concerning which have already been stated, refused to issue a summons to Alden Bradford and did issue a summons to James R. Talbot.

In Lincoln county Andrew R. G. Smith received a plurality of all the votes cast; the returns were regular in form. In the returns from two towns the name of Andrew R. C. Smith was returned instead of Andrew R. G. Smith. The records of both towns gave the name of Andrew R. G. Smith. Certified copies of such records were proffered to the Governor and Council, in order to correct said returns thereby. Had said certified copies been received, it would have appeared by the returns as amended that said Andrew R. G. Smith was duly elected; but the Governor and Council refused to receive said copies, or to correct said returns thereby, or to issue a summons to Andrew R. G. Smith, but did issue a summons to Isaac T. Hobson.

In York county Charles P. Emery, Joseph W. Dearborn and George H. Wakefield received a plurality of all the votes cast. Charles P. Emery received a summons. In the case of each of the others, one of the initials was given incorrectly in the return of one town, but if the vote of the city of Saco had been counted, each would have appeared by the

returns to be elected. But the Governor and Council rejected the Saco returns, the facts concerning which have been heretofore stated, refused to issue summonses to Joseph W. Dearborn and George H. Wakefield, and did issue summonses to Ira S. Libby and John Q. Dennett.

In all the cases, Senatorial or Representative, where returns were rejected on extrinsic evidence that they were not signed and sealed, or the records not made up in open town meeting, it does not appear on the returns themselves, but does appear by certificate of the selectmen on the back of the official envelopes enclosing said returns, that said returns were signed and sealed and the records made up in open town meeting.

On the thirty-first day of December, A. D., 1879, the Governor required the opinion of the Justices of the Supreme Judicial Court upon certain questions submitted by him, and by the opinion of said justices in reply thereto, it appeared that the objections and alleged defects in the returns hereinbefore stated were without foundation in law. The Governor and Council were requested in all these cases to recall the summonses, which by the opinion of the court appeared to have been improperly issued, and to report the names and places of residence of the persons legally elected to both branches of the Legislature to the Secretary of State, to be entered upon the certified rolls as required by law, but this they refused to do.

A certified roll was furnished by the Secretary of State to the clerk of the preceding House of Representatives, containing the names of one hundred and twenty-two persons properly summoned as representatives elect, and seventeen persons heretofore enumerated, viz: Lewis Voter, Daniel Snow, Alfred Cushman, James O. White, Leonard H. Beal, Osgood N. Bradbury, George W. Johnson, Lincoln H. Leighton, Aaron H. Woodcock, Harper Allen, Joshua E. Jordan, F. W. Hill, James W. Clark, James Flye, John H. Brown, James M. Leighton and Stephen D. Lord, and no more, no names of Representatives for the five cities above enumerated appearing on said roll.

On the first Wednesday of January, 1880, the assistant clerk of the preceding House of Representatives, the clerk of said preceding House being present, proceeded to call the names on the certified roll above described, whereupon one hundred

and thirty-five persons answered to their names. Attention was then called by one of the persons so responding to the vacancies appearing upon the reading of said roll.

A motion was then made that the representatives from said five cities, appearing by the returns from said cities to have been actually elected, should be permitted to participate in the organization of the House. The assistant clerk refused to put the motion, and refused to entertain an appeal. Motion was then made that a committee be raised to inform the Governor and Council that a quorum was present, and ready to take the oath. Upon that question a call for the yeas and nays was demanded and it was so taken, and there were seventy-three voted in the affirmative and none in the negative. Attention was then called to the fact that no quorum was present. Motion was then made to adjourn, which said assistant clerk refused to entertain or put, and the same was put by the mover and declared carried. Thereupon a number of the members left the hall. The Governor and Council appeared to administer the oath. One of the members summoned called the attention of the Governor to the fact that no quorum had voted to qualify, but the Governor declined to notice this act on the part of the number summoned. Thereupon the Governor proceeded to administer the oath.

After the rolls containing the oath were signed the Governor announced that seventy-six persons summoned had subscribed the oath, among whom were the persons previously enumerated by name as appearing on said roll, except Lewis Voter and Daniel Snow.

The announcement of the Governor that seventy-six persons had subscribed the oath was doubted by a member who had subscribed the oath, and a repeated demand was made that this announcement should be verified by reading the names of those who had subscribed, but the assistant clerk declined so to do. Protest was made against the administration of the oath before it was administered. Thereupon an election of Speaker was attempted, and John C. Talbot received seventy-two votes, no other votes being thrown.

On the next day sixty members summoned, and whose names appeared on the certified roll, applied to James D. Lamson, who claimed to be President of the Senate, to be qualified, and he refused in writing to administer to them the oath required by law.

The facts connected with the alleged organization of the Senate on the first Wednesday of January, 1880, are as follows:—A certified roll was furnished by the Secretary of State to the Secretary of the preceding Senate, on which were the names of twenty-three persons properly summoned, and who appeared to be elected as shown on the face of the returns, together with the names of Daniel W. True, Edward A. Gibbs and William R. Field, of Cumberland county, Rodolphus P. Thompson, of Franklin county, James R. Talbot, of Washington county, Isaac T. Hobson, of Lincoln county, Ira S. Libby and John Q. Dennett, of York county, and at 10 o'clock in the forenoon, on said day, said Secretary of the preceding Senate called the names on the roll and each one responded.

Thereupon one of the members, properly summoned, called attention to the fact that the names above enumerated on the roll had been substituted for the names of Andrew Hawes, Henry C. Brewer and David Duran, of Cumberland county, George R. Fernald, of Franklin county, Alden Bradford, of Washington county, Andrew R. G. Smith, of Lincoln county, Jeremiah W. Dearborn and George H. Wakefield, of York county, who appeared by the returns to be elected, and moved that their names be substituted on the roll for those first above enumerated. The Secretary refused to entertain the motion; the oath was then administered by the Governor and Council; the motion was immediately thereafter renewed, and the Secretary again refused to entertain the motion; an appeal was then taken to the Senate; the Secretary refused to put the question; protest was then made that unless the substitution moved was made, eleven members properly summoned, and having a plurality of the Senatorial votes in their respective counties, would refuse to participate in the organization of the Senate. No attention having been paid to this protest, said eleven members did not participate in the further proceedings. The remaining twenty persons proceeded to vote for President of the Senate, and James D. Lamson received twenty ballots, which were cast by twelve members properly summoned, and by the eight persons first above enumerated.

Public protest was immediately made by a member duly summoned against the election of James D. Lamson as

President of the Senate, because he had received the votes of but twelve persons lawfully summoned.

The remainder of the officers of the Senate were elected in the same manner, and by the same persons as the President.

On the 12th day of January, 1880, the persons claiming to be the legally elected members of the Legislature, but having present less than seventy-six in number, attempted to meet in joint convention for the purpose of witnessing the administration of oaths to James D. Lamson, to qualify him to exercise the office of Governor, together with twenty members of the Senate, only twelve of whom appeared to be elected by the returns. On the same day sixty-two members of the House, to whom James D. Lamson, claiming to be President of the Senate, had refused to administer the oath, and who were properly summoned, together with John R. Eaton, William H. Thomas, A. F. Andrews, David M. Norton, Henry C. Baker, Charles A. Rolfe, A. B. Cole and Robert French, Cyrus A. Thomas, Hiram A. Steward and John Burnham, previously mentioned, together with the representatives of the cities of Portland, Lewiston, Saco, Rockland and Bath, met in the hall of representatives and organized by the choice of speaker, clerk and other officers, after being qualified by taking the oaths prescribed by the constitution, before William M. Stratton, clerk of the courts for Kennebec county, and authorized by *dedimus potestatem* to administer oaths according to law. The speaker received eighty-two votes; the clerk received eighty votes; the assistant clerk received eighty-one votes. After organizing, the following members, Isaac Hanscom of Lebanon, Edward K. Hall of Newcastle, Robert M. Loring of Robbinston district, George S. Hill of Exeter, Frank C. Nickerson of Linneus, and Oliver P. Bragdon of Gouldsboro district, were admitted by resolution to act as members *prima facie* of said House of Representatives. On the same day in the Senate Chamber, eleven members properly summoned, together with Andrew Hawes, David Duran, Henry C. Brewer of Cumberland county, Jeremiah W. Dearborn, George H. Wakefield of York county, George R. Fernald of Franklin county, Alden Bradford of Washington county, the facts concerning whose election have been hereinbefore stated, met together, and were called to order by Jeremiah Dingley, a Senator elect from Androscoggin county, on whose

motion Austin Harris, Senator elect from Washington county, was chosen to preside as chairman, and Charles W. Tilden was chosen Secretary *pro tem.* Upon resolution, Andrew R. G. Smith of Lincoln county, was admitted *prima facie* to a seat.

Upon motion, the members elect present proceeded to make a permanent organization by the election of President, Secretary, and other officers. Joseph A. Locke, of Cumberland, was chosen President, receiving eighteen votes, and Charles W. Tilden was chosen Secretary, receiving nineteen votes. The members were qualified, before election of officers, by taking the oaths prescribed by the constitution, before William M. Stratton, clerk of courts for Kennebec county, and authorized by *dedimus potestatem* to administer oaths. In the organization of both branches of the Legislature, the names of all the members elect, who appear by the uncorrected returns to be elected, were placed upon a roll and were called before proceeding to organize the same, as herein last mentioned.

On the foregoing statement the following questions are submitted:

QUESTIONS AND ANSWERS.

BANGOR, January 16, 1880.

The undersigned, Justices of the Supreme Judicial Court, have the honor to submit the following answers to the interrogatories proposed and based upon the accompanying statement of facts:

QUESTION 1. Have the Governor and Council a right under the constitution to summon a person to attend and take a seat in the Senate, or House of Representatives, who by the official returns under the decision of the Court, does not appear to be elected, but defeated or not voted for; or would such summons be merely void as exceeding the power of the Governor and Council under the constitution?

ANSWER. An election has been had by the electors of this State. The rights of the several persons voted for, depend upon the votes cast. The result should be truly determined

in accordance with the constitution and laws of the State. It was the duty of the Governor and Council thus to declare it. Any declaration of the vote not thus ascertained and declared is unauthorized and void. The Governor and Council examined the returns and undertook to declare the result as appeared by the returns. Various questions involving the true construction of the constitution and statutes relating thereto arose, and the Governor, by virtue of his constitutional prerogative, called upon this Court for its opinion upon the questions propounded. By the provisions of the constitution the Court was required to expound and construe the provisions of the constitution and statutes involved. It gave full answers to those questions. The opinion of the Court was thus obtained in one of the modes provided in the constitution for an authoritative determination of "important questions of law." The law thus determined is the conclusive guide of the Governor and Council in the performance of their ministerial duties. Any action on their part in determining the vote as it appears by the returns in violation of the provisions of the constitution and law thus declared is a usurpation of authority, and must be held void. It only remains to apply those principles to the subjects embraced in the questions propounded.

The Governor and Council have no right to summon a person to attend and take his seat in the Senate or House of Representatives, who by the returns before them, was not voted for, or being voted for was defeated. To summon one for whom no votes had been cast would be a deliberate violation of official duty. To summon those whom the returns show were not elected would be equally such violation. Either would be intruders without right into a legislative body. The summons thus given would be void, as in excess of any powers conferred by the constitution. Grant this power, and the right of the people to elect their officers is at an end.

QUESTION 2. Has the holder of any such summons a right to take part in the organization, or subsequent proceedings of either house, to the exclusion of the members rightfully elected, as shown by said returns under the decision of the Court; or does such right rest in said last named member to the exclusion of the member summoned from the same district?

QUESTION 3. If summonses were issued, under the facts recited in the statement herewith submitted, to Lewis Voter of Farmington district, Daniel Snow of Skowhegan district, Alfred Cushman of Ashland district, James O. White of Jay district, Leonard H. Beal of Lisbon district, Osgood N. Bradbury of Stoneham district, George W. Johnson of New Sharon district, Lincoln H. Leighton of Cherryfield district, Aaron H. Woodcock of Vanceboro' district, Harper Allen of Fairfield district, Joshua E. Jordan of Searsport district, would such summonses give either of the above-named persons a right to take part in the organization, or subsequent proceedings of the House; or would such right rest in Cyrus A. Thomas of Farmington district, Hiram S. Stewart of Skowhegan district, John Burnham or Ashland district, John R. Eaton of Jay district, William H. Thomas of Lisbon district, A. F. Andrews of Stoneham district, David M. Norton of New Sharon district, Henry C. Baker of Cherryfield district, Charles A. Rolfe of Vanceboro district, A. B. Cole of Fairfield district, Robert French of Searsport district, to the exclusion of the persons summoned from the same district?

QUESTION 4. If summonses were issued under the facts recited in the statement herewith submitted, to Daniel W. True, Edward A. Gibbs, William R. Field of Cumberland county, Rodolphus P. Thompson of Franklin county, James R. Talbot of Washington county, John Q. Dennett and Ira S. Libby of York county, would such summonses give either of the above named persons a right to take part in the organization or subsequent proceedings of the Senate; or would such right rest in Andrew Hawes, David Duran, and Henry C. Brewer of Cumberland county, George R. Fernald of Franklin county, Alden Bradford of Washington county, George H. Wakefield and J. W. Dearborn of York county, to the exclusion of the person summoned from the same district?

ANSWER. The second, third and fourth questions may be answered together. The answer to the first question covers much of the ground embraced by these questions. Holders of summonses which are void for the reason that the Governor and Council have failed to correctly perform the constitutional obligation resting upon them, have no right to take a part in the organization or in any subsequent proceedings of the house to which they are wrongfully certificated. They are

not in fact members. But the members rightfully elected, as shown by the official returns, and the opinion of the Court upon the propositions heretofore by the Governor presented to the Court, are entitled to appear and act in the organization of the houses to which they belong, unless the House and Senate, in judging of the election and qualification of members, shall determine to the contrary.

A member without a summons, who appears to claim his seat, is *prima facie* entitled to equal consideration with a member who has a summons.

He is not to be deprived of the position belonging to him, on account of the dereliction of those whose duty it was to have given him the usual summons. The absence of that evidence may be supplied by other evidence of membership. The House and Senate have the same right to consider and determine whether, in the first instance, such persons appear to have been elected, and finally, whether they were in fact elected, as they have of any and all the persons who appear for the purpose of composing their respective bodies.

Under the facts recited in the statements submitted to us, we are of the opinion that Lewis Voter and associates, first named in question three, were not entitled to act, and that Cyrus A. Thomas and associates lastly named in the question were entitled to act in the House as members, and that Daniel W. True, and those first named in question four were not entitled to act, and that Andrew Hawes and others with him named were entitled to act as members of the Senate. In neither case did the Senate or House itself act upon the question of their membership. Both the Senate and House, (meaning the bodies assembled to be organized as such,) were debarred from any action thereon, by the conduct of the presiding secretary and clerk. The assumption of such officers, that no question should be entertained relative to the rights of persons whose names are not upon the rolls furnished by the Secretary of State, but who were claimants of seats, was unwarrantable. The statute of 1869, embodied in the Revised Statutes, chapter 2, section 25, cannot preclude either the Senate or House from amending and completing the rolls of membership, according to the facts. Each House has the constitutional right to organize itself.

The form provided for aid and convenience in effecting the

organization does not confer upon a temporarily presiding officer such conclusive power.

We have not failed to carefully consider the act of 1869, chapter 67, incorporated into R. S., chapter 2, § 25; and, so far as it declares that "No person shall be allowed to vote or take part in the organization of either branch of the legislature as a member, unless his name appear upon the certified roll of that branch of the legislature in which he claims to act," we think it clearly repugnant to the constitution which declares that each house shall be the judge of the election and qualification of its own members. It aims to control the action of each within its constitutional power till after a full organization, with a majority determined and fixed by the Governor and Council.

By their action in granting certificates to men not appearing to be elected, or refusing to grant certificates to men clearly elected, they may constitute each house with a majority to suit their own purposes, thus strangling and overthrowing the popular will as honestly expressed by the ballot. The doctrine of that act gives to the executive department the power to rob the people of the legislature they have chosen, and force upon them one to serve its own purposes.

It poisons the very fountain of legislation, and tends to corrupt the legislative department of the government. It strikes a death blow at the heart of popular government and renders its foundation and great bulwarks,—the will of the people, as expressed by the ballot,—a farce.

Each house has the same power, and is charged with the same duty, to declare the election of its own members and organize in any legitimate way as before the passage of that act.

QUESTION 5. Does the same rule apply, when the member summoned appears by the returns to be elected, only because of some error in the name or initials of the candidate not summoned, when such error is correctible by law, under the decision of the Court, and the official record states the name and initials correctly, under the facts of the Lincoln Senatorial district, and the Representative districts of Exeter, Newcastle, Gouldsboro', Weston and Robbinson, as recited in the statement herewith submitted; or when the member summoned appears by the returns to be elected, only by rejecting the

returns of one town because unsigned by the town clerk, though a duly attested copy of the record of said town is seasonably offered as a substitute and rejected, under the facts as recited in the statement of the Lebanon district?

ANSWER. In the answers of January 3, 1880, this Court held, that, in cases like those stated in this question, it is the duty of the Governor and Council to hear evidence and determine whether the record or return is correct, and, if they determine the record to be correct, to receive it or a duly certified copy of it, to correct the return, as is provided in chap. 212 of the Acts of 1877.

But in such case they are required to determine an issue of fact, whether the record or return is correct, and, so far as their action is concerned, in determining that fact, we think their determination is conclusive; subject of course, to be reversed by the House. If, however, they should refuse to hear evidence and determine the question, and should, by reason of such refusal, issue a summons to the candidate not elected, the case would fall under the rule above stated.

QUESTION 6. If the summons described in question 1 is void, and persons holding such summonses take part in the organization of either Senate or House of Representatives, and, without the votes of such persons, there are less than sixteen (16) members in the Senate, and less than seventy-six (76) members in the House, voting for and against any of the officers of the so-called Senate or House, have such bodies any legal organization or officers?

ANSWER. If objection was made to the admissibility of the illegally summoned persons, as set forth in the statement presented to us, and the houses took no action thereon, then an organization of House or Senate, in the manner described in this question, would be illegal and void.

The Court expressed the opinion, on a former occasion, that the Senate could organize with less than a quorum of members, (35 Maine, 563), where less than a quorum were elected, a condition of things that might happen when it required a majority of votes to elect Senators—that decision met the necessities of that occasion. But the doctrine of that case cannot apply, when a quorum is in fact elected.

QUESTION. 7. Without such legal organization in either House or Senate, or without sixteen (16) members in the

Senate and seventy-six (76) members in the House, present and voting, on the given measure, can any valid law be enacted, any legal officer chosen or any business whatever be legally done, except to adjourn; and if any business, what business?

QUESTION 8. Without a legal organization formed, and legal officers chosen, by seventy-six (76) members, present and voting, in the House of Representatives, and sixteen (16) members, present and voting, in the Senate, can either House, compel the attendance of absent members?

ANSWER. Without a legal organization formed and legal officers chosen, by seventy-six members, present and voting, in the House of Representatives, and by sixteen members, present and voting, in the Senate, upon the given measure, no officers can be chosen or law passed or business done, except to adjourn.

No less than seventy-six members can constitute a quorum of the House of Representatives, nor can less than sixteen members, (now that a plurality elects,) constitute a quorum of the Senate. Nor can either House, without a legal organization formed and without legal officers chosen, compel the attendance of absent members.

It is the House or Senate when formed and organized that has the power to compel such attendance, and it is not within the power of persons who are merely members elect to do so. The attendance may, under our constitution, be compelled by such penalties as each House may provide. Until a legal organization has been effected, there is no House to provide penalties for such purpose. Until a legal organization is completed, there is no officer in either House to issue a warrant against the absent member. No such power was committed, or intended to be committed, into the hands of persons not comprising and acting as an organized and completed House. It has frequently happened in our history, that legislative bodies have been delayed days, and sometimes weeks, without being able to complete an organization for the want of a quorum.

QUESTION 9. To make up the legal quorum required on any vote in either House, can the votes of any person be counted who, though summoned, does not appear to be elected

by the official returns under the constitution, and the decision of the Court?

ANSWER. Not if the attention of the House is called to the fact that such persons are illegally summoned, and objection is seasonably made to the counting of such persons for the purpose of making up a quorum; and the House does not act upon the question of their admissibility.

By the constitution, Art. 4, § 5, "the Senate, shall, on the first Wednesday of January, annually, determine who are elected by a plurality of votes to be Senators in each district."

QUESTION 10. Can the Governor and Council legally administer the qualifying oath to the members elect of the House of Representatives when, on a yea and nay vote, as shown by the record, only seventy-three (73) members, both sides inclusive, vote on the motion to request the attendance of the Governor and Council for that purpose?

QUESTION 11. Can a valid organization of the House be made under the Revised Statutes, chap. 2, § 23, when, under the facts as stated in question 10, a protest was entered, at the time, that no quorum was manifest on the yea and nay vote, and, notwithstanding that protest, the clerk refused to put a motion to adjourn, and the Governor appeared and administered the oath?

QUESTION 12. Can the Governor and Council legally administer the qualifying oaths to the members elect of the Senate, when only twenty (20) members, both sides inclusive, vote on the motion to request their presence for that purpose, and of that twenty (20), eight (8), though summoned, did not appear to be elected by the official returns under the constitution and the decision of the Court, and were not in fact elected?

ANSWER. These three questions, referring to the qualification of members by the administration of the required oath, may be answered together. By the constitution, the oath is to be taken and subscribed in the presence of the Governor and Council. By the statute R. S., chap. 2, § 23, the clerk of the preceding House shall preside until the representatives elect "shall be qualified and elect a speaker; and, if no quorum appear, he shall preside, and the representatives elect present

shall adjourn from day to day, until a quorum appear and are qualified, and a speaker is elected." Thus, it will be seen that, while by the statute, the clerk is to preside until a quorum shall appear and be qualified, it is not provided, either in the constitution or the statute, that a less number than a quorum shall not be qualified. Nor can the yea and nay vote on the motion to request the attendance of the Governor and Council, for the purpose of administering the oath, be deemed of any importance. If the Governor and Council had appeared, without a motion or a vote, their authority would have been the same. We therefore answer, that the qualifying oaths under the constitution or statute may be administered to the members elect of either branch in any numbers, though a quorum must appear and be qualified before proceeding to election of speaker; and if the whole number of votes for speaker is less than a quorum, and there is nothing upon the record to show that a quorum was present and acting, there would be no election.

QUESTION 13. At what date in the year eighteen hundred and eighty, (1880), do the terms of office of the following State officers, elected in January, eighteen hundred and seventy-nine, (1879), expire: The Governor, the Executive Council, the Secretary of State, the Treasurer, the Attorney General, and the Adjutant General?

ANSWER. The Governor's term of office, and also that of his Council, expired at midnight following the first Wednesday of January, 1880. The term of the other officers mentioned in this question will expire when their several successors are elected, as provided in the constitution.

QUESTION 14. When the terms of office of the Governor and Council have expired, or their offices are vacant, and there is neither Governor nor Council, can the members elect of the Senate and House of Representatives be legally qualified before a magistrate appointed and commissioned by the Governor, with advice of the Council, under a *dedimus potestatem*, by virtue of the Revised Statutes, chap. 2, secs. 85 and 86, or by any other provision of law.

QUESTION 24. When the terms of office of the Governor and Council have expired, and the acting President of the Senate has refused to qualify the duly summoned members-elect, and

the acting House of Representatives—made up of sixty-two (62) members legally summoned, and fourteen (14) others summoned, but not in fact elected, and not appearing to be elected by the official returns, under the decision of the Court—refuse to admit to seats the fourteen (14) members-elect, specified in question 19, or the nine (9) additional members-elect, specified in question 20, or any one of them, can the seventy-six (76) members specified by question nineteen, or the eighty-five (85) members specified by question twenty, after being called to order by one of their number, and a roll of the members-elect read as they appear by the official returns, be qualified before a Dedimus Justice, and thus constitute and organize a legal House of Representatives?

QUESTION 25. When the terms of office of the Governor and Council have expired, and the acting Senate—made up of twelve (12) members legally summoned, and eight (8) others summoned but not in fact elected, and not appearing to be elected, by the official returns under the decision of the Court—refuse to admit to seats the seven (7) members who were in fact elected, and who appeared to be elected by the official returns and the decision of the Court, can the seven (7) members thus denied seats, acting with eleven (11) members-elect duly summoned, after being called to order by one of their number, and a roll of the members-elect read as they appear by the official returns and the decision of the Court, be qualified before a Dedimus Justice and thus constitute and organize a legal Senate?

ANSWER. To the 14th, 24th, and 25th questions proposed we answer as follows:

In the general provisions of the constitution, article 9, certain oaths or affirmations are prescribed for persons elected, appointed or commissioned to the offices therein mentioned. It appears that those before whom the prescribed oaths were to be administered refused to act, and that now there is no existing Governor and Council before whom they can be administered. The oath is prescribed. The terms are the essential. Its binding force depends upon its terms, not on the magistrate by whom it is administered.

If there is no Governor and Council, or, being a Governor and Council, they refuse to administer the oath to one

representative or to all—for there can be a refusal to all equally as to one—what is the result?

Is anarchy to triumph? Can the goverment be destroyed or its action paralized because there is no Governor and Council, before whom the prescribed oath is to be taken? We think not. The prescribed oath, from the necessity of the case, may be taken before a magistrate authorized to administer oaths. The members must be sworn before they can act. It is by their action that a Governor and Council, thereafter, is to be settled and the government continued.

It cannot be presumed that the framers of the constitution had in comtemplation that the oath had better not be administered at all, than administered by any other officer than the one designated therein. This is one of the most reliable tests by which to distinguish a directory from a mandatory provision. State *vs.* Smith, 67 Maine, 328.

QUESTION 15. When the term of one Governor has expired by law and no successor has been chosen, can the President of the Senate become acting Governor, if, at his election, twenty (20) votes only are cast for and against him, and those twenty (20) votes are made up as described in question 12?

ANSWER. Our reply to the fifteenth question is in the negative, that one, whose only title to the Presidency of the Senate is by virtue of such an election, cannot become the acting Governor, because he is not a legal President of the Senate. If, of the twenty voting at such choice of President of the Senate, eight did not appear to be elected by the official returns under the Constitution and the decision of the Court, and were not in fact elected, there was then no legal quorum, and could be no valid election of permanent officers, notwithstanding the eight had been summoned by the Governor and Council. Without a legal quorum, and with these eight participating in the proceedings to the exclusion of those rightfully elected in their places, there could be no valid election of President of the Senate. To proceed with the organization of the Senate without first determining and declaring its own membership, when attention was properly called to the fact that persons were present and acting without right, and that members were excluded, the Secretary refusing to entertain a motion for the correction of the roll,

and refusing to allow an appeal from his ruling, and the Senate taking no action although protest was made, was illegal and void.

QUESTION 16. Can a legally chosen President of the Senate become acting Governor, until he has legally qualified as such, in addition to this qualification as President of the Senate?

QUESTION 17. Can such qualifying oaths be legally administered by a President *pro tempore* of the Senate in joint convention of the Senate and House of Representatives, when less than seventy-six (76) members of the House are present or voting on the motion to proceed to joint convention?

ANSWER. Under the letter of the constitution, it is at least doubtful whether the President of the Senate is required to take a new oath, before exercising the office of Governor, when that office has become vacant in the manner specified therein. The practice since the organization of the State, has, we believe, been uniform against requiring such new oath, and to such practical interpretation of the constitution, in the absence of express provision or manifest intention to the contrary, we think effect should be given. To the sixteenth question we reply, that a legally chosen President of the Senate may become acting Governor, without the administration of any other qualifying oath than that which he has taken in his office of Senator.

The answer to the sixteenth question renders a reply to the seventeeth unnecessary.

QUESTION 18. When twelve (12) persons are legally elected members of the House of Representatives from the five cities of Portland, Lewiston, Rockland, Bath and Saco, and that fact unmistakably appears on the official returns and by the decision of the Court, on the facts recited in the statement herewith submitted, have those twelve (12) members elect a right to take part in the organization and all subsequent proceedings of the House, without a summons from the Governor and Council, no other persons holding summonses for the same seats?

ANSWER. To the 18th question we answer as follows:

It appears from the statement of facts, that the members from the five cities of Portland, Lewiston, Rockland, Bath

and Saco were duly elected, as well as by the returns before the Governor and Council; that by law a summons should of right have been issued to them; that in fact no summons was issued; and that their names were not borne on the roll certified to the House as provided by R. S., chap. 2, § 25. A motion was seasonably made that these members apppearing by the returns before the House to have been duly elected should be permitted to participate in its organization, but the assistant clerk refused to put the motion and to entertain an appeal.

By the constitution the returns were before the House. By those returns the representatives above named appeared to be elected. Their seats were not contested. The Governor and Council could not, without a violation of their constitutional duty, neglect to issue to them a summons, nor the Secretary of State to place their names on the certified roll, which it was his duty to furnish. The Governor and Council could not legally withhold their summonses from those appearing to be elected. They could not order a summons to issue to some appearing to be elected and withhold it from others. If they could, it would be in their power to select from the members appearing to be elected, those who should and those who should not take part in the organization of the House.

The section 25, R. S., chap. 2, restricts the vote to those whose names are borne on the certified roll. The restricting the vote to those *only* whose names are thus borne is at variance with the constitution, in so far as it restricts and limits the action of the House to those whom the Governor and Council may select, and not to those appearing to be chosen, and to those the House may determine to be members.

The twelve members had a right to act in the organization of the House. Their election was patent on inspection of the returns. The House in no way denied their right. The question whether their names should be added to the roll was not submitted to its determination. Upon the facts set forth, they appeared to be and were elected, and it is not to be presumed that the House, knowing such facts, would have prohibited their action if the clerk had permitted the question to be put.

These members had a right to take part in the organization of the House, until it should otherwise determine.

QUESTION 19. Can a House of Representatives legally organize or act under a certified roll containing one hundred and thirty-nine (139) names only, and giving no representation to the five cities of Portland, Rockland, Lewiston, Bath, and Saco, under the facts as stated in question eighteen (18) without admitting, at once, the twelve (12) members from said cities?

ANSWER. The House cannot legally organize or act under a certified roll of 139 names only, and giving no representation to the five cities named, provided the representatives from the cities appeared and claimed their seats, and the House took no action whatever upon the question of their right to participate in the organization, the clerk refusing to entertain a motion made for that purpose, and refusing to entertain an appeal from his ruling thereon.

QUESTION 20. When persons are legally elected members of the House from the representative districts of Skowhegan and Farmington, and that fact unmistakably appears on the official returns, and by the decision of the Court, on the facts recited in the statement herewith submitted for those districts, have those members-elect a right to take part in the organization, and all subsequent proceedings of the House, without a summons—the persons summoned having returned their summonses, and declined to serve as representatives on the ground that they were not elected?

ANSWER. To question 20 we answer in the affirmative, unless the House has acted upon the question of their right to act as members and determined to the contrary.

QUESTION 21. Can eleven members, duly elected and summoned, and seven other members, not summoned, "but appearing to be elected by a plurality of all the votes returned," under the requirements of the Constitution and the decision of the Court, constitute and organize a legal Senate, provided said eighteen members each received, for Senator, a plurality of all the votes cast, and the official records, as well as the official returns, show that fact?

QUESTION 22. Can sixty-two (62) duly summoned members-elect of the House of Representatives, together with twelve (12) members-elect not summoned from the cities of Portland, Lewiston, Bath, Saco and Rockland, and two (2)

members-elect not summoned from the towns of Farmington and Skowhegan, constitute and organize a legal House of Representatives, when the fourteen (14) members above enumerated were in fact elected, and that fact appears by the official returns, and by the decision of the Court, no other persons holding summonses for the same seats?

ANSWER. It is the opinion of the Court that questions 21 and 22 may be conveniently answered together. Our answer is this: Circumstances may exist which will justify, and render legal, such an organization of the Senate, and such an organization of the House. We think such organizations would be justified and rendered legal, by the existence of such circumstances as are recited in the statement of facts submitted to us; and that such organizations, effected under such circumstances, would constitute a legal legislature, competent to perform all the functions constitutionally belonging to that department of our government.

Tumult and violence are not requisites to the due assertion of legal rights. They should be avoided whenever it is possible to do so. They can never be justified, except in cases of the extremest necessity. Such peaceful modes of organization are far preferable to a resort to violence.

No rights should be lost by those who seasonably assert them, and appeal to the constitutional tribunals instead of resorting to force.

QUESTION 23. Can the seventy-six (76) members elect, enumerated in question nineteen, (19) constitute and organize a legal House of Representatives, together with nine (9) other members elect, who were in fact elected, and appear by the official returns, and by the decision of the court, to be elected, though the nine (9) seats aforesaid are claimed by other candidates who were summoned by the Governor and Council, but were not in fact elected, and do not appear to be elected by said official returns, under the decision of the Court?

ANSWER. It will follow from the answers to questions twenty-one and twenty-two, that this question, for the reasons and upon the circumstances there referred to, must be answered also in the affirmative.

QUESTION 26. When a person receives a summons as a member of the House of Representatives, and returns the same to the Governor, before the assembling of the Legislature, and resigns his seat, is it competent for him to recall and cancel that resignation, after the Legislature has assembled and organized, or can he be compelled to attend as a member?

ANSWER. One who, under such circumstances, returns his summons and resigns his seat, thereby makes a vacancy in the House which is to assemble, which vacancy "may be filled by a new election," under the provisions of Article IV, Part I, § 6 of the constitution. That the proper steps may be taken by the municipal officers to that end, it is necessary to regard such resignation as irrevocable. If, when once made, it could be recalled at will, the municipal officers could never know that the seat was vacated by resignation. One who has thus resigned cannot be compelled to attend as a member. He is no longer a member. The language of the Court, touching the power of the House to compel the attendance of their members, in the constitutional opinion given in 35 Maine, 563, applies only to those who, without vacating their seats absent themselves from the sessions of the body to which they were elected. It would be alike contrary to the spirit of our institutions, and detrimental to public policy, to hold that a man might be compelled to accept an office of such a character. We therefore answer the question in the negative.

QUESTION 27. In case the official returns of the votes cast for Governor should be lost, concealed, or inaccessible, by accident or fraud, is it competent to count the votes for Governor, by using certified copies of the official record of the several cities, towns and plantations in the State?

ANSWER. In our recent answer to questions presented by the Governor, we said, in substance, that one of the objects of the constitutional requirement of a record of the vote, to be made at the same time and authenticated in like manner with the return, was to guard against the possible result of mistake, accident, or fraud in the official returns of votes. When such returns of the vote for Governor are lost, concealed, or

inaccessible by accident or fraud, the result of the election may still be ascertained by using certified copies of the official records mentioned in the question. Neither the carelessness nor the turpitude of the officers charged with the making, or the custody, of the returns can be suffered to defeat the will of the people, as expressed in the election, so long as the legislature can ascertain it from the records thus made. True, the constitution provides that the Secretary of State shall, on the first Wednesday of January, lay the lists before the Senate and House of Representatives, but this provision is directory, and a failure to comply with it cannot defeat the right of the legislature to ascertain and declare the result of the election.

When the framers of our constitution and our legislators have taken such pains to perpetuate the evidence of the votes cast, and to guard that evidence against the effect not only of accident, but of human fallibility or perfidy, it is not to be thrown away because the Secretary of State fails, or is unable to comply with this direction. The constitution is to be construed, when practicable, in all its parts, not so as to thwart, but so as to advance its main object, the continuance and orderly conduct of government by the people. We answer the question in the affirmative.

The questions before us are attested in the usual mode, and purport to come from organized bodies.

They are of the utmost importance.

Our answers are entirely based on the assumption of the existence of the facts as therein set. forth. We cannot decline an answer if we would. In a case like the present, the remark of Chief Justice Marshall, in Cohens *vs.* Virginia, is peculiarly applicable. "It is most true," he says, "that this Court will not take jurisdiction, if it should not, but it is equally true that it must take jurisdicton, if it should."

The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts or whatever difficuties a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction, which is given, than to usurp that which is not given. The one or the other

would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them.

JOHN APPLETON,
CHARLES W. WALTON.
WILLIAM G. BARROWS,
CHARLES DANFORTH,
JOHN A. PETERS,
ARTEMAS LIBBEY,
JOSEPH W. SYMONDS.

To JOSEPH A. LOCKE, *President of the Senate*,
and GEORGE E. WEEKS,
Speaker of the House of the Representatives,
Augusta, Maine.

STATEMENT AND QUESTIONS SUBMITTED

BY HENRY INGALLS ET. ALS., JANUARY 23, 1880.

The Committee appointed to consider the question of the constitutional organization of the House, and the present condition of affairs, and which have been instructed to prepare and present to the House a Statement of Facts with questions appended thereto to be presented to the Judges of the Supreme Judicial Court, have attended to their duty and ask leave to report:

From evidence produced before your Committee, the committee find the following facts in regard to the Governor and Council, in relation to the returns of votes for members of the Senate and House of Representatives of the fifty-ninth legislature of Maine: On the 19th day of November, A. D. 1879, the Governor and Council commenced to open the returned copies of the lists of votes for senators and representatives to the fifty-ninth legislature, which were made

and forwarded to the Secretary of State, by officers of the several cities, towns and plantations in this State, and were opened by the Governor and Council. The Governor and Council then proceeded to examine said returned copies of said lists of votes, for the purpose of ascertaining what persons thereby appeared to be elected to the Senate and House of Representatives, by a plurality of all votes returned. After careful examination of the returns themselves, they entertained all evidence offered, in which it was proposed to show that returns from any town or city did not agree with the record of the vote of such town or city which was made up in open meeting, as the constitution requires, in number of votes or names of persons voted for.

They did not, after about November 25, 1879, exclude, or refuse to hear, or consider any such evidence, but held open sessions and gave all persons ample opportunity to present such records, and to be heard thereupon, excepting at such times as the Governor and Council were engaged in other official business, until the day on which they were required, by the constitution, to issue summonses to such persons as appeared to be elected by a plurality of all votes returned, to attend and take their seats. They heard counsel in argument in all cases in dispute that arose during their examination of returns, where it was desired, at such times as were convenient for the Governor and Council; and in no instance was any party interested, or their counsel, precluded from a hearing, except for a few days after the Governor and Council commenced to open returns, and before they had themselves sufficiently examined them to perceive upon what points doubts might arise, as to the correctness of returns, and they declined all hearings until about the 25th of November, after which time their sessions were open, and all interested parties were freely heard; copies of records, made up in open meetings as the constitution requires, were presented to them from a large number of the cities and towns of the State, all of which were carefully examined by the Governor and Council, and all testimony and argument offered concerning them heard and considered; and in each instance the Governor and Council considered and determined as issue of fact, whether there was any difference between record and return, and which was correct, and in no instance did they refuse to correct a return

by a copy of a record of town made in open town meeting, or by copy of record made by city clerk in meeting of aldermen, as required by the constitution. In several instances, where an original record was presented and found to agree with the returns, records were afterwards presented which had been made up by town and city clerks, long after original records were made, and in most instances after returns had been opened by the Governor and Council and compared with the original records, and found to be in entire correspondence therewith. Such new records, not made in any open meeting, the Governor and Council decided were not admissible to correct returns, and they decided, as matter of fact, in all such cases, that the original return and record were correct, and therefore in no instance did they correct returns by such new or amended records. In some instances, oral evidence was offered to prove that the votes cast were not intended for persons named in the returns and original records; in all such cases, the Governor and Council found, as a matter of fact, that the original return was correct, and determined not to make any change upon the verbal evidence.

Twenty days before the first Wednesday in January, 1880, the Governor and Council issued summonses to such persons as appeared to be elected thereto by a plurality of all the votes returned, to attend and take their seats in the Senate and House of Representatives, as the constitution requires. In no instance was a summons issued to any person who was not voted for, or who was not elected by a plurality of all the votes returned, as appeared by returns duly examined and adjudicated upon by the Governor and Council, as hereinafter set forth. The Governor and Council examined the returns from the cities of Portland, Rockland, Saco, Lewiston and Bath, and found, ascertained and determined, as a matter of fact, that said returns did not show that the Aldermen of either of said cities, did, in the presence of the city clerk, open, examine and compare the copies from lists of votes given in the several wards of said cities, or that the city clerk of said cities made a record thereof, and that return thereof was made into the Secretary of States office, in the same manner as selectmen of towns are required to do. They also had before them the original records from said several cities, and had evidence and arguments respecting

the same, from parties and counsel interested therein, claiming there was evidence of an election in said cities, and thereupon, considering the returns, the records, arguments and evidence, adjudicated thereupon, and found, as matter of fact, that there was no sufficient evidence which would warrant their correction of the original return, or which proved, to their satisfaction, that any persons were elected as representatives from said cities, and they therefore declared and reported vacancies in the same. In the case of Portland, a record was made up by the city clerk, after the original return and original record had been examined by the Governor and Council, differing materially from the return and original record. But the Governor and Council decided that such evidence was incompetent to establish an election in said city. The Governor and Council made a report to the Secretary of State, in due form, of names of persons who were elected senators and representatives to the legislature, as ascertained by them from examinations of returns, and to whom summonses had been issued; and the Secretary of State furnished to the Secretary of the preceding Senate a certified roll, under seal of the State, and names and residences of senators elect, according to said report of Governor and Council, from which it appeared that thirty-one senators were elected and had been duly summoned. And the Secretary of State, in like manner, furnished the Clerk of the preceding House of Representatives a certified roll, under seal of the State, of names and residences of representatives elect, according to the said report of Governor and Council, from which it appeared that one hundred thirty-nine members were elected, and said secretary also reported the vacancies in said several cities, which were twelve in number, a copy of which said certified rolls are referred to as part of this report.

On the first Wednesday of January, 1880, pursuant to the constitution and laws of the State, members of the House of Representatives elect, holding summonses from the Governor and Council, to attend and take their seats therein, duly issued as above set forth, and whose names appear on the certified roll of members of the House, assembled in the hall of the House of Representatives, to the number of one hundred and thirty-five members, and were called to order by W. E. Gibbs, Assistant Clerk of the preceding House of

Representatives (B. L. Staples, clerk of said preceding House being unable to act,) who presided until the members were qualified and Speaker elected. Said roll, from the Secretary of State, of representatives-elect, was called by said assistant clerk, and one hundred and thirty-five members responded to call, and a quorum was found to be present. Seventy-six members of said House, whose names appeared upon said roll, thereupon took and subscribed the oaths required by the Governor and Council, and said seventy-six members all being present and taking part in said meeting, a ballot for Speaker was then had, and Mr. J. C. Talbot having received seventy-two votes was elected Speaker, and upon further ballot being had, Wingate E. Gibbs, having received seventy-four votes, was elected Clerk.

Subsequently, on the same day, Stephen J. Young, member from Brunswick, whose name was entered upon said roll, was duly qualified and took his seat. The record of proceedings of said House of Representatives to, and including, said 12th day of January, is made part of this report, as also said certified roll. During all said first Wednesday of January, there was an opportunity for all other members to qualify, but fifty eight members neglected and refused to do so. Subsequently, on a later day, sixty members applied to the President of the Senate, who had not then assumed to act as Governor, to be qualified by him in presence of the council of the preceding year, no new council being elected, which the President of the Senate declined to do, at that time, but after that time, having assumed the duties of Governor, namely, on the 12th day of January, notified them that he was prepared so to do, but said sixty members neglected and refused to so qualify. Thereafter, in the night-time of the same day, at six o'clock in the evening, the said sixty members and two others who had been duly qualified, together with twelve other persons holding no summonses to appear and take their seats, and whose names were not on the certified roll, but who claimed to be elected, making seventy-four in all, met in the hall of representatives, without giving notice to the seventy-five other members already duly qualified, or giving them any opportunity to take part in the preceedings if they should so desire, although the election of sixty of said seventy-five members was undisputed, and who held summonses to appear and take their seats, and whose names were on said certified

roll, and attempted to organize a House of Representatives by choice of speaker, clerk, and other officers. After being qualified, by taking the oaths prescribed by the constitution, before Wm. M. Stratton, a Clerk of Courts for Kennebec county, and authorized by *dedimus potestatem* to administer the oaths required by law, eleven other persons holding no summonses, and whose names were put on said rolls, were then admitted as members of said body, and were qualified by said Stratton as above. After which, they proceeded to election of officers, as above set forth, and after attempting to transact some further business, said assembly then adjourned to Saturday, January, 17th. On the said first Wednesday of January, 1880, all those said members of the Senate elect, and who held summonses to appear and take their seats, duly issed as before set forth, pursuant to the constitution and laws of the State, and whose names appeared in the roll which was certified by the Secretary of State to the Secretary of the preceding Senate, as hereinbefore set forth, being thirty-one members, assembled in the Senate chamber, and were called to order by Samuel W. Lane, Secretary of the preceding Senate, who presided during the organization of the Senate.

The certified roll was called by said secretary, and said thirty-one members responded to call of their names, and the whole number of members composing that body was found to be present. All the above members then took and subscribed the oaths required by the constitution, before the Governor and Council, and then, all being present, and taking part in said meeting, a ballot for President was had, and James D. Lamson having received twenty votes, was elected; and upon further ballot being had, Albert G. Andrews, having received nineteen votes, was elected Secretary. The record of the proceedings of said Senate to, and including, the 12th day of January is made part of this report, also said certified roll of members of the Senate. Subsequently, in the night time of the 12th day of January, commencing at six o'clock in the evening, eleven members of the Senate who had been duly qualified as heretofore set forth, and taken their seats in the Senate organized on the first Wednesday in January, and had acted and voted in said Senate as members thereof, up to said 12th day of January, together with seven other persons

who did not hold summonses to appear and take their seats, and whose names were not upon the certified roll, met in the Senate chamber, without giving notice to the twenty other members of Senate, already duly qualified, or giving them any opportunity to take part in their proceedings, if they should so desire, and attempted to organize a Senate by choice of President and other officers.

After the last named seven men had been qualified by taking the oaths prescribed by the constitution, before W. M. Stratton, Clerk of Courts for Kennebec county, and authorized by *dedimus potestatem* to administer oaths according to law, and, after attempting to transact some further business, said assembly adjourned to Saturday, January 17.

In all that was done, as hereinbefore set forth by the Governor and Council, they acted in ascertainment and performance of their duty, under the constitution and laws, aided by a previous opinion of the judges. The opinion of the judges promulgated on the 5th day of January, 1880, was not received until long after the Governor and Council had completed their duties as herein set forth, and certified rolls had been made out by the Secretary of State, and forwarded to the Secretary of the preceding Senate and Clerk of the preceding House of Representatives. The Senate and House of Representatives, in their organization and choice of President and Speaker, on the first Wednesday of January, 1880, acted upon the rules of parliamentary law well established in this State as they understood them, and relating to which reference is hereby made to the following extracts from the opinion of the judges, promulgated on the 5th day of January, only two days before said organization, namely:

"To constitute a quorum it is only necessary to have a majority of the whole number present, and when such quorum is present, a majority of the quorum may do business. Supposing the number to be seven, four constitute a legal quorum, and three being a majority of that quorum could legally act, although the four should refuse to join them, or oppose there action. Consequently, if a return from a city having five aldermen is signed by three of them, it may be a valid and legal return, because only four may have been present, and in such case three, (being a majority of those present,) could legally act, although the four should oppose

their action, and refuse to join them. The law with respect to quorums is correctly stated in 5 Dane's Abridgement, 150, and 1 Dillon's Municipal Corporations, sections 216, 217. In both works it is said, that bodies composed of a definite number act by majorities of those present, providing those present constitute a majority of the whole number, or to use the Ionic illustration, if a body consists of twelve councilmen, seven is the least number that can constitute a valid meeting, though four of the seven may act, and, so far as we are aware, the law is so construed, in substance, by all ancient and modern authorities.

The rule applicable in such cases is similar to that which applies to our House of Representatives. The whole number of members of the House of Representatives, established by law, is 151. A majority, that is, seventy-six members, constitute a quorum to do business. If there is actually that number present, and a majority of them, that is thirty-nine members, vote in the affirmative, a valid law can thereby be enacted, or any business transacted."

Upon the foregoing statement of facts and copies of records and rolls, we submit the following questions to the Justices of the Supreme Judicial Court, and request answers thereto:

1. Was the organization of the Senate and election of President and Secretary thereof, on the first Wednesday of January, 1880, as set forth in the foregoing Statement of Facts, and as appears by the record thereof, legal and in accordance with the constitution and laws of the State?

2. Was the organization of the House of Representatives, and election of a Speaker and Clerk thereof, on the first Wednesday of January, 1880, as set forth in the foregoing Statement of Facts, and as appears by the record thereof, legal and in accordance with the constitution and laws?

3. Were the bodies of the persons who held the meeting on the evening of the 12th day of January, as set forth in the foregoing Statement of Facts, competent, at that time, and under the circumstances stated, to organize a Senate and House of Representatives for the State of Maine, to constitute the fifty-ninth Legislature, and were they legally organized as such, and do they constitute a legal Legislature, under the constitution and laws of the State?

4. If the Senate, organized on the first Wednesday in January, 1880, in the manner set forth in the foregoing

Statement of Facts, was not legally organized, is that body a convention of the senators elect by or through which a Senate may or must be organized, that body having adjourned from day to day from said first Wednesday of Jannary to the present time?

5. If the House of Representatives, on the first Wednesday of January, 1880, in the manner set forth in the foregoing Statement of Facts, was not legally organized, is that body a convention of the members of the House of Reprsentatives elect, by or through which a House of Representatives may or must be organized, that body having adjourned from day to day, from said first Wednesday of January to the present time?

All of which is respectfully submitted.

HENRY INGALLS, Chairman.
J. O. ROBINSON,
N. WILSON,
F. W. HILL.

JUSTICES' ANSWER TO QUESTIONS SUBMITTED.

BANGOR, January 27, 1880.

In response to the foregoing communication, the undersigned, Justices of the Supreme Judicial Court, have the honor to say that, while we cannot admit even the implication that the statement and questions now before us are presented by any legally organized legislative body, so as to require an opinion from us, under the constitutional provision of Article 6, Section 3, we feel that we should be omitting an important service, which the people of this beloved State and the gentlemen who have presented these questions, presumably from an honest desire to know their duty as citizens in the premises, might fairly expect of us, if we failed to give some of the reasons which compel us to decline to entertain and respond to the aforesaid statement and questions based thereupon.

The solemn occasion is indeed here, in the unparalleled and ominous events in our public history, which have occurred

within the last few months; but we are bound to declare that these questions are not presented by a legally constituted legislative body, for the following reasons briefly stated:

When different bodies of men, each claiming to be, and to exercise the functions of, the legislative department of the State, appear, each asserting their title to be regarded as the law-givers for the people, it is the obvious duty of the judicial department, who must inevitably, at no distant day, be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of those bodies lawfully represents the people from whom they derive their power. There can be but one lawful legislature. The court must know, for itself, whose enactments it will recognize as laws of binding force, whose levies of taxes it will enforce when brought judicially before it, whose choice of a prosecuting officer before the court it will respect. In a thousand ways, it becomes essential that the court should forthwith ascertain, and take judicial cognizance of, the question, which is the true legislature.

The existence of certain facts, raising questions as to the powers and duties of the Governor and Council, in canvassing the votes for members of the Senate and House of Representatives, was necessarily implied in the questions propounded by Governor Garcelon, and answered by this court under date of January 3. To put such questions, in the absence of facts requiring their solutions, would be an abuse of the power of an executive to call for the opinion of the court upon questions of law, on solemn occasions. Those questions were fully answered, and, by the answers, it appeared that the acts and doings of the Governor and Council, in issuing certificates of election to certain men as Senators and members of the House of Representatives who did not appear to be elected, and declining to issue certificates and summonses to certain men who did appear to be elected, were in violation of their legal and constitutional obligations and duties.

We are bound to take judicial notice of the doings of the executive and legislative departments of the government, and, when called upon by proper authorities, to pass upon their validity. We are bound to take judicial notice of historical facts, matters of public notoriety and interest transpiring in

our midst. We cannot accept a statement which asserts, as facts, matters that are in conflict with the record and with the historical facts, that we are not at liberty to disregard. We cannot shut our eyes to the fact that the Governor and Council, then in office, disregarded the opinion of the court, given in answer to the Governor's questions, omitted to revoke the summonses illegally issued to men who did not appear to be elected, or to issue summonses to men who did appear to be elected. We know that the officers who presided in the conventions of the members elect of the Senate and House, on the first Wednesday in January, recognized, as members of both those bodies, men who were unlawfully introduced into them by the unconstitutional and illegal methods pursued by the Governor and Council, and refused to recognize men who appeared to be legally elected, and refused to permit any appeal, from their illegal decisions, to the bodies over which they were temporarily presiding. The report of the committee of the Council and the action of the Governor and Council thereon, of which we must take judicial notice, show that men were thus admitted and excluded, upon grounds which this court declared, in their answer to Governor Garcelon's questions, to be untenable and illegal. It cannot be successfully claimed that there was ever a quorum in the House of Representatives, which undertook to organize on the first Wednesday of January, without counting men who could only appear to be elected, because the late Governor and Council pursued modes which this court declared, in their answers to his questions, to be unconstitutional, illegal and void. These men were not, in fact, elected. They did not appear to be elected, by the returns canvassed in the manner in which the constitution and law, rightly interpreted, required the Governor and Council to canvass them.

We cannot recognize a House of Representatives, to make a quorum in which the presence of these men was necessary, as a lawfully constituted body, or capable of performing any of the functions of a House of Representatives, when due protest was made in behalf of those who were in fact elected by the people. In like manner, the presence, in the Senate, of men claiming seats, to the exclusion of those whom a canvass legally conducted would show to be elected, and being recognized as members of the convention by the temporarily presiding officer, who, though protest against his

illegal action was made on the spot, refused to permit an appeal from his decision to the convention of Senators-elect, vitiated the organization of that body. We have only to reaffirm the principles we asserted in our answers of January 16, 1880, upon those subjects, in coming to the result that the bodies propounding to us the foregoing questions, are not a legally organized House of Representatives and Senate, under the constitution of this State.

It remains to be considered, whether there is a legally organized legislature in existence, entitled to enact laws that must be binding upon the people and the courts of the State. The action of those controlling the proceedings, on the first Wednesday of January, 1880, has not been acquiesced in by a quorum of those appearing to have been elected to either house. It is a matter of history that, after unsuccessful resistance to the illegal action of the officers attempting to create the legislative organization on that day, a majority of the persons who appeared to be elected to the two houses formed an organization of themselves. They refrained from forming an independent organization, until the 12th day of January, hoping, until then, to obtain their rights in some other way. They were forced into such a position by the illegal action of the minority of members, whose action they were not obliged to submit to, and which they could, in no other reasonable manner resist. The organizations, made on January 12th, were made by a majority of the members appearing to be elected, and having the *prima facie* right to seats. The point is raised by the statement, and questions submitted, that no legal organization could be formed on January 12th, because no notice of the intended action was given to the minority or non-attending members, so as to enable them to participate therein. The minority were not excluded. The organization was made in a public manner. The minority were at the time claiming to be, and are still claiming to be, the lawful legislature. It is not to be presumed that they would have abandoned that organization, at that time, had notice been given. We do not think that the want of notice invalidates the organizations of January the 12th. There may be irregularities in the manner in which such organizations were formed, but the voice of the people is not on that account to be stifled, nor the true government to fail to be maintained.

No essential defects anywhere exist, but only such departure from ordinary forms as circumstances compelled. History can never fail to declare the vital fact that the organizations of January the 12th were formed by full quorums of persons appearing by the records and returns as duly elected members of either house.

It cannot be that such a construction must be given to the constitution of the State as will subvert the plain and obvious intention of its framers, or place it in the power of a few men to perpetuate their hold upon the offices in the gift of the people, in defiance of the will of the voters, constitutionally expressed and ascertained, because there own neglect of duty has made some departure from directory provisions and ordinary forms inevitable.

A legally organized legislature being now in existence and exercising its constitutional functions, it follows that no convention of members-elect of either house can exist which can be treated as a nucleus for another organization. Two governments are claiming to be in existence, as valid and entitled to the obedience of the people. Both cannot rightfully exist at the same time; but one government can be recognized and obeyed. The responsibility and solemn duty are imposed upon us, to determine which is entitled to judicial recognition.

We therefore, after due deliberation and consideration of all matters involved, affirm and declare our judgment to be, that the Senate, whose presiding officer is the Hon. Joseph A. Locke, and the House of Representatives, whose presiding officer is the Hon. George E. Weeks, constitute the legal and constitutional legislature of the State.

(Signed) JOHN APPLETON,
CHARLES W. WALTON,
WM. G. BARROWS,
CHARLES DANFORTH,
JOHN A. PETERS,
ARTEMAS LIBBEY,
JOSEPH W. SYMONDS.

To A. G. Andrews, H. H. Cheever, Esq., Augusta, Me.