ACTS AND RESOLVES

OF THE

SIXTY-FIRST LEGISLATURE

OF THE

STATE OF MAINE.

1883.

Published by the Secretary of State, agreeably to Resolves of June 28, 1820, February 18, 1840, and March 16, 1842.

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1883.

Orders Submitting Questions.

STATE OF MAINE.

IN COUNCIL, March 31, 1881.

ORDERED, That the opinion of the Justices of the Supreme Judicial Court be respectfully asked by the Governor and Council upon the following statement:

April 24th, 1880, J. W. Spaulding was appointed by the Governor, with advice and consent of Council, as Reporter of Decisions of the Law Court of Maine, and commissioned to hold his office "four years unless sooner removed by the Governor and Council for the time being," and has been discharging the duties of that office ever since. On the 29th inst. the Governor, without advice or consent of the Council, claimed to remove said Spaulding from said office, by causing the Secretary of State to serve upon him a notice, a copy of which with a copy of the Commission is hereunto annexed.

Question. Has the Governor the power of removal without the concurrence of the Council, in manner as claimed by him?

IN COUNCIL, March 31, 1881.

Read and passed by the Council, but the Governor withheld his approval.

JOSEPH O. SMITH, *Secretary of State.*

A true copy. Attest:

JOSEPH O. SMITH, *Secretary of State.*

STATE OF MAINE.

EXECUTIVE DEPARTMENT.

To the Hon J. W. SPAULDING, Richmond, Maine.

You are hereby notified that the term of your office as

REPORTER OF DECISIONS,

which you hold "during the pleasure of the Executive," is terminated and you are removed from said office.

Witness my hand and the seal of the State at Augusta, the 29th day of March, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States of America the one hundred and fifth.

[*Seal of the State.*]
HARRIS M. PLAISTED.

By the Governor.

JOSEPH O. SMITH, *Secretary of State.*

A true copy. Attest:

JOSEPH O. SMITH, *Secretary of State.*

STATE OF MAINE.

TO ALL WHO SHALL SEE THESE PRESENTS, GREETING.

Know ye, That Daniel F. Davis, our Governor, reposing special trust and confidence in the integrity, ability and discretion of Joseph W. Spaulding of Richmond, hath nominated, and by and with the advice and consent of our Council, appointed the said Joseph W. Spaulding, Reporter of Decisions of the Supreme Judicial Court.

[*Seal of the State.*]
DANIEL F. DAVIS.

We, therefore, do hereby authorize and empower him to fulfil the duties of that office according to law; and to have and to hold the same; together with all the powers, privileges and emoluments thereto of right appertaining unto him, the said Joseph W. Spaulding, for the term of four years, if he shall so long behave himself well in said Office, unless sooner removed by the Governor and Council for the time being.

In Testimony Whereof we have caused these Letters to be made Patent and our Seal to be hereunto affixed.

Witness, our Governor, at the Council Chamber, in Augusta, the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

By the Governor.

J. O. SMITH, *Deputy Secretary of State.*

A true copy. Attest:

JOSEPH O. SMITH, *Secretary of State.*

STATE OF MAINE.

IN COUNCIL, March 31, 1881.

Inasmuch as the Governor has withheld his approval of an order this day passed by the Council, inviting a concurrent application by the Governor and Council, to the Justices of the Supreme Judicial Court, for their opinion upon the question of the power of the Governor, without the advice and consent of the Council, to remove the Hon. J. W. Spaulding as Reporter of Decisions of the Law Court of Maine, and inasmuch as the Council deem it an important question of law, coming within the provisions of Art. V., Sec. III, of the Constitution of this State, whether, by the action of the Governor, a vacancy exists in said office, therefore,

ORDERED, That this Council most respectfully ask the opinion of said Justices upon the question and facts submitted in said order, and that the Secretary of State be directed to forthwith forward to the Honorable Chief Justice of said Court, certified copies of both orders and the paper thereunto annexed.

IN COUNCIL, March 31, 1881.

Read and passed by the Council.

JOSEPH O. SMITH, *Secretary of State.*

A true copy. Attest:

JOSEPH O. SMITH, *Secretary of State.*

OPINIONS.

BANGOR, Sept. 1, 1881.

To the Honorable The Council of Maine:

In accordance with the provision of the Constitution imposing upon the Supreme Judicial Court, the duty of giving its opinion upon important questions of law and upon solemn occasions, when required by your body, we have the honor to answer as follows:

From the papers forwarded it appears that Joseph W. Spaulding was nominated, and with the advice and consent of the Council appointed, Reporter of the Decisions of the Supreme Judicial Court, and his commission accordingly issued on the 24th of April 1880, in the form adopted at the organization of the government of this State, and followed ever since, reciting therein that he was "to have and hold the same together with all the powers, privileges and emoluments thereto of right appertaining unto him, the said Joseph W. Spaulding, for the term of four years, if he shall so long behave himself in said office, *unless sooner removed by the Governor and Council for the time being.*"

The original appointment of the Reporter was for an unlimited term of years. The language of the commission was subsequently changed, in respect of time in consequence of chapter 257 of the acts of 1824, by which the term of office was limited to four years. But in all cases, the Reporter held his office subject to be "removed by the Governor and Council for the time being."

Under and by virtue of this commission, Mr. Spaulding being duly qualified, entered upon the discharge of the duties of the office to which he had been appointed. On March 29th, 1881, the Governor by a paper signed by him, headed Executive Department, to which the seal of the State was attached, notified Mr. Spaulding that the term of his office as Reporter of Decisions, which he held during the pleasure of the Executive, was terminated and that he was removed

from said office. This act, if done "in the executive part of his duty," was without the advice or the consent of the Council.

The question upon which our opinion is required relates to the power of the Governor in the removal of an officer nominated and commissioned by him with the advice of the Council, as in the present case.

The order of the Council requiring the opinion of the Court received neither the assent nor the approval of the Governor. But that was unnecessary. By the Constitution, Art. 6, § 3, this Court is obliged to give their opinion on important questions of law and upon solemn occasions, when required by the Governor, Council, Senate or House of Representatives.

The Council have the same right to require the opinion of the Court as the Governor or either of the other designated bodies. In case of disagreement between the Governor and his Council, the right to require an opinion is given to each, to one as much as the other. The assent of the Governor is not needed to nor can his dissent or veto prevent the action of the Council.

That the question at issue is important and that this is a solemn occasion, within the constitutional provision, should not be questioned, since it involves the constitutional rights and powers and duties both of the Governor and of the Council.

Whether there is a vacancy in the office of Reporter or not is a question of public concern. The action of the Council in the exercise of their advisory functions is dependent on the determination of this question. When the inquiry was made the question was pending. If there was no vacancy, the option was with the Council to create one or not, as the public interest might require. If there was a vacancy there was no option. It would be their duty to fill it, when in their judgment a suitable nomination should have been made. To know what their action should be, it is first to be determined, whether there be a vacancy, without which knowledge they cannot understandingly act.

So, too, if the Reporter is not removed, he is entitled to his salary for his official services, and that, too, without the delay incident to protracted litigation.

Whether there is a salary due or not is a question depending upon the power of removal existing in the Governor alone.

The opinion of this Court has been required in some forty instances in relation to a variety of subjects and under different circumstances. In no instance has the obligation to answer been questioned or an answer denied. The inquiries made have embraced a great number of subjects—the right to and the tenure of office — the duty of the executive department in relation to the counting of votes—the right to a membership of the House or Senate—the fees of the members of those bodies—the organization of the Legislature and the constitutionality of statutes, &c.—matters affecting individuals and the public, but in respect to which it was deemed advisable to obtain the opinion of the Court before final action should be had in reference to the subject matter embraced in the inquiries proposed. In pursuance, therefore, of the obligations imposed upon us by the constitution, we proceed to consider the questions submitted.

Article 5, part 1st, of the constitution, relates to "executive powers" and defines and limits the same.

By § 1 "The *supreme executive* power of the State shall be vested in a Governor," thus recognizing him as the head of the executive department of government. But he is not the executive department. "He shall take care that the laws be faithfully executed." He may issue commissions, sign warrants, remit penalties, grant reprieves, commutations and pardons—but he does all this by and with the advice of his Council. He carries into effect the doings of the executive department of which he is the head but he does not control it.

If he was clothed with supreme and uncontrolled executive power, the Council would have no duties. His powers are only what are specially given him by the constitution or necessarily inferrable from powers clearly granted. He is to execute the powers conferred, in the manner and under the methods and limitations prescribed by the constitution and the statutes enacted in accordance therewith.

It was early held that the President of the United States had the power of removal without the concurrence of the Senate, though not that of appointment, without such concurrence.

The question was so close, that this construction was carried by the casting vote of the Vice President. This construction has ever been doubted by many of the ablest Statesmen and Jurists.

Indeed, in the argument advanced for the adoption of the constitution by the great Statesman, whose influence was alike paramount, in its formation and adoption, it is said that "consent of the body would be necessary to displace as well as to appoint,"—thus holding that the power of removal was an inference from that of appointment.

But whether this construction was right or wrong, no argument can be drawn from the power claimed and exercised by the President of the United States. The constitution of this State differs so widely from that of the United States, that the argument from the exercise of such power by the President is entirely inapplicable. The reasons assigned for the exercise of that power without senatorial concurrence, were, first, that there might be great misfeasance in a public officer and the necessity of prompt action, which might not be had if the Senate was not in session. But this does not apply, because the Council may be readily convened at any time by the call of the Governor.

The second reason was, that as the Senate is the Court for the trial of impeachment, it would not be an impartial tribunal for the trial of those who had been appointed through its instrumentality. But the Council of Maine has nothing to do in the matter of impeachment.

Thirdly. It was argued that as the power to participate in removals was not given in terms to the Senate, the power could not be implied. The answer then made to this was that it was no more expressly given to the President than to the Senate, and that the implication no more arises in his case than in that of the Senate; that the power of appointment was given conjointly to the President and Senate and the power of removal if granted, was granted by implication to both. But the argument for the power of the President, whether unanswerable or not, has no application to the question under discussion. And, besides, this power of the President has been limited and restricted by subsequent legislation, by Revised Statutes U. S., § 1767, and seq., which diminish and regulate his power of removal in essential particulars.

In this State the Council is a part of the executive department, and specially created "to advise the Governor in the executive part of government." Indeed, it will be seen, in the different parts of the constitution, that when the appoint-

ment is by the Governor with the advice and consent of Council, not only no power of removal is given to the Governor, but that he is even denied that power when an officer is to be removed by address, without the advice of his Council first had and obtained.

By § 8 of the same article, "He shall nominate, and, with the advice and consent of the Council, appoint all judicial officers, coroners, notaries public; and he shall also nominate, and with the advice and consent of the Council, appoint ALL other civil and military officers, whose appointment is not by this constitution or shall not by law be otherwise provided for," &c. The cases, "otherwise provided for," are those in which the advice and consent of the Council is not necessary. The Reporter is not an officer "otherwise provided for," because his appointment is by their advice and consent. Except in the special instances, in which the power of appointment is conferred on the Governor, he can not appoint without the concurrence of the Council. Where he has such power by statute, he has the right of removal as incident to the power of appointment.

As an illustration, by chap. 290 of the Acts of 1837, continued through all subsequent revisions and found in R. S., 1871, c. 110, § 1, the Governor of the State was authorized to appoint commissioners to take the acknowledgement of deeds and to commission them to hold office during *his* pleasure. So the Act of 1876, c. 110, authorizing certain persons to solemnize marriage, gives the right to appoint to the Governor alone.

These are instances of the officers "otherwise provided for," where the Council have nothing to do in advising or consenting to the appointment or removal. The power of the Governor is derived from the statutes, conferring it, and from them alone.

By section one of part second, of the same article, the Council are "to advise the Governor in the executive part of government," and he with the Councillors or a majority of them, may from time to time hold and keep a council for ordering and directing the affairs of the State according to law. The Council are "to advise the Governor in the executive part of government." Appointments belong to the executive part of government. The removal of unfit or

incompetent men belongs equally to "the executive part of government." If removals belong to "the executive part" of his duty, then the Council by the constitution are to advise with him in reference thereto, unless otherwise specially provided. If they are not done "in the executive part of government," from whence is the power derived? The right to remove is claimed as belonging to the executive part of government, but if it be so, then it is a part in which the Council are to advise. The very claim by the Governor to remove as belonging to the executive part of government, necessarily requires and involves the advice of Council, unless there are portions of the "executive part of government" in which he may act without advice. But the constitution designates none such, and the power of removal by the Governor exists only in the few cases specially "provided for," where the appointing and the removing power is intrusted to him by statutory provisions.

The Council is to be held and kept "for ordering and directing the affairs of the State according to law." A removal is no less one of the affairs of the State than is an appointment. There in nothing more important than that the offices of the State be filled by able and competent men, and if they are held by weak, incompetent men, that such men should be removed. Now, the removal and the appointment equally appertain to "the affairs of the State," in the ordering and directing of which the Council are to participate, unless it is to be held that the one is an affair of the State and the other is not.

By Art. 9, § 6, "The tenure of all offices which are not or shall not be *otherwise provided* for, shall be during the pleasure of the Governor and Council."

The general rule is that appointments are by the Governor with the advice and consent of the Council, and the tenure is during their pleasure. The tenure may be at the pleasure of the Governor alone, when he has the appointing power without advice or consent of his Council. The cases "otherwise provided for" are those where the appointing power is vested in the Governor alone—and the power of removal being an incident to that of appointment, is in his hands, or there is a constitutional limitation upon the conditions and duration of official tenure.

By Art. 9, § 5, "every person holding an office, may be removed by the Governor with the advice of the Council, on the address of both branches of the Legislature." In the only case, where removal is specifically referred to, the advice of the Council is required. In the case of an address by both branches of the Legislature the power of removal is not intrusted to the Governor as the Supreme Executive, but is made subject to the limitation of the advice of the Council.

If on address made by both branches of the Legislature for the removal of the Reporter, the Governor could not remove except by the advice of Council, much more then can he not remove on his own motion—except in the special cases otherwise "provided for," where he may remove those he has appointed without advice of Council. It is thus clear, that the general power of appointment or removal is no part of the executive functions of the Governor alone. In reference to each his action is restricted by the advice and consent of his Council. Even in the special case of an address of both branches of the Legislature, he is subject to their advice, without which there can be no removal. His power of removal is restricted to the instances where the appointment is vested in him alone, and the power of removal is specially given in the statute conferring the appointing power or is an inference from the power of appointment.

Where the appointments have been with the advice and consent of the Council, the removals have been by the appointment and qualification of a successor. The appointment and removal are by one and the same act. The appointment removes. This should obviously be so, else the Governor might create vacancies he could never fill, because the Council not consenting to his nominations, the offices would remain vacant. Hence removals have ever been by confirmed nominations. The removal is a consequence of the appointment of a new officer. It never precedes it.

The document purporting to be a removal, is equally unauthorized and unprecedented in the administration of the State.

The power of removal where the appointment is by the Governor with the advice and consent of the Council, is not conferred by the constitution on the Governor. Neither is it by the statute creating the office, which was approved June 20, 1820, by which the Governor by and with the advice of

the Council "was empowered to appoint a Reporter," who was "removable at the pleasure of the executive."

A constitution had just been adopted. A new government had been inaugurated. Those who framed the constitution were called upon to administer the government. The act first creating the office of Reporter, was passed shortly after the adoption of the constitution. The president of the constitutional convention was the Governor of the State. The office was created "removable at the pleasure of the executive." The commission issued, to have and to hold, &c., "unless sooner removed by the Governor and Council for the time being." Thus those administering the government at its very inception, construed "Executive" to mean Governor and Council. The form then adopted has been in use to the present time, in reference to the tenure of the Reporter's office, as well as to the other offices, when in the statute creating them, this language is used.

The statutes have been repeatedly revised, and the same language used, and commissions in the same form issued.

The contemporaneous meaning given to the word "Executive," has received the sanction of every succeeding administration.

The Reporter, be it observed, is "removable at the pleasure of the executive," that is by the Governor with the advice and consent of the Council, not by the *supreme* executive power or authority, as in the case where the Governor as "the supreme executive authority" of the State, issues as such, his warrant "under the great seal of the State," to the Sheriff or his deputies commanding him, in the case of one sentenced to death, to carry said sentence into execution. In such case his action is without the advice or consent of his Council, R. S., c. 135, § 9. Nor is the Reporter made removable "by the Governor" simply.

The executive power is clearly referred to, that is, the executive branch of the government.

"Great deference has been paid in all cases to the action of the executive department, when its officers have been called upon under the responsibilities of their official oaths, to inaugurate a new system, and when it is to be presumed, they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the constitution."—Cooley on Constitutional Limitations 69.

It is implied in the claim to remove, that every preceding State administration has erred in the meaning to be attached to the word "executive," and that every commission issued, where the language of the act creating the tenure is like the one establishing the office of Reporter, has been issued not merely without, but against law. But it will be found on examination that the construction given to the Statute is recognized by the constitution, by acts of the Legislature and in the messages of the different Governors of the State. Undoubtedly the word may sometimes be used in a different sense, but as Mr. Story has well observed: "It does not follow either logically or grammatically, that because a word is found in one connection in the constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs." The same remark is equally applicable in the construction of a statute as of the constitution.

The act of Massachusetts of June 19th, 1819, "relating to the separation of the District of Maine from Massachusetts proper and forming the same into a separate and independent State," in part is embodied in the constitution of this State.

By § 6 of this act "the Executive authority" of each State was to appoint two Commissioners in relation to the division of the public lands, &c., in Maine, and the four so appointed shall appoint two more, and in case of their disagreement, the Executive of each State shall appoint one in addition, &c. "Executive" and "executive authority" are used as equivalent terms, and were understood as referring to appointments by the Governor of the respective States by the advice and consent of their respective Councils, and the appointments were so made—so that in each State, the terms "executive" or "executive authority," were by the respective governments of each State construed as meaning Governor and Council. The right to remove as well as to appoint was conferred by these words.

Governor King, in his message of January 11, 1821, says the situation of the Judges of the Circuit Court of Common Pleas is not such at this time as is contemplated by the constitution. The Courts not having been organized anew, the Judges continue to act under their old commissions, and thus hold their offices during the pleasure of the Governor

and Council, and not during good behavior, as the principles of the constitution require. Governor Parris, in his message of January 5, 1822, referring to this subject, says: "On examination, I find that the law of Massachusetts, establishing a Circuit Court of Common Pleas, has not been revised and re-enacted here, and on turning to the Council records, that the Justices of that Court do not hold their commissions from the executive of this State, except such only as have been appointed to fill vacancies. Of course, this court exists by a law of the parent State in force under the provisions of the act of separation, and the whole of its members in the first and third circuits and one on the second, hold their office during the pleasure of the executive, instead of good behavior, as contemplated by the constitution." It will be perceived that in these communications the Governor and Council were considered the "executive."

By chapter 226, of the acts of 1823, "the Governor, with the advice of Council," was authorized to appoint a suitable person to superintend the erection of the State Prison. Governor Parris, in his message of January 10, 1824, on this subject, says "The *executive* proceeded to the appointment of a suitable person to superintend the erection of said prison," &c.

By chapter 78, of the resolves of 1824, the amount of fifteen hundred dollars was placed at the disposal of the Governor with the advice of Council for the education of the deaf and dumb. Governor Parris, in his message of January 7, 1825, uses this language: "The executive have adopted such measures as seemed most likely to comport with the views of the Legislature and to secure the accomplishment of the object"—that is, the education of the deaf and dumb.

By the resolve of February 2, 1828, the Governor with advice of Council was authorized and requested to appoint during pleasure "a Commissioner of Public Buildings," with power to obtain plans and estimates of the probable expense of preparing grounds and finishing the Public Buildings for the accommodation of the Executive and Legislative departments to be laid before the Governor and Council for their approval, subject to changes, modifications and alterations to be suggested and approved by them.

Hon. William King was appointed the Commissioner of Public Buildings under this resolve, and in answer to a

request by Governor Lincoln, he writes January 29, 1829, "Having been requested to present to the Executive the plans for the erection of a building for the accommodation of the Legislative and Executive departments," &c., he proceeds to give his estimates and plans as far as completed—directing his communication to the Governor and Council—as the executive to whom his plans and estimates were to be presented.

It is to be observed that the Commission was to act under the advice and direction of the Governor and Council. The House of Representatives having requested a copy of the directions, Governor Smith in his message of February 1, 1831, in compliance with such request says: "I herewith transmit copies of all the directions, which have been given by the Executive in relation to the State House," &c.

Governor Smith in his message to the Senate and House of Representatives of February 7. 1832, after saying that the Secretary of State will lay before them a communication from the Commissioner of Public Buildings, stating the amount of expenditures, proceeds as follows: "In furnishing the house in a suitable manner, it was found necessary to exceed the appropriations made for that purpose, and several additions and alterations not contemplated in the original plan have been made by the Commissioner under the direction of the executive department."

On February 17, 1831, (c. 490) an act was approved, the object of which was as alleged in the preamble, to make valid the alleged unconstitutional acts of the Legislature and the doings of the executive department of 1830.

By § 4, the doings of any officer deriving his authority from the *executive department* of that year shall not be set aside or held void by reason of the unconstitutionality of the doings and proceedings mentioned in the preamble of the act.

By § 5, it was enacted that no marriage solemnized by any person deriving his authority to solemnize marriages from said *executive* shall be set aside or made void by reason of any defects in the proceedings aforesaid, that is the legislative and executive proceedings of the preceding year.

By the *then* existent law, persons appointed to solemnize marriage were appointed and commissioned by the Governor with advice of Council—(since changed by c. 110, of the Acts of 1876 as before stated.)

The words executive and executive department were used to mean Governor and Council in a carefully worded and important act rendering valid all the acts of the legislative and executive departments.

By a resolve of March 23, 1835, the Governor with the advice of Council was authorized to appoint three Commissioners of the State Prison to report the best system of prison discipline. The appointments were made and in his message of January, 1836, Governor Dunlap says: "By recurring to the proceedings of the last Legislature you will find that a resolve was passed authorizing the Governor with the advice of Council, to appoint Commissioners to report a System of Prison Discipline for the State, &c. In conformity to the authority vested in the executive, the trust was confided to William D. Williamson, Nathaniel Clark and Joseph R. Abbott," &c.

By a resolve of March 1, 1836, the Governor by advice of Council was authorized to appoint an agent to superintend the erection of an Insane Hospital under the general direction of the Governor with the advice of Council. In his message of 1837, Governor Dunlap says: "In conformity to the authority vested in the executive, the trust was confided to Reuel Williams, Esq.," &c.

In all these cases the power was intrusted to the Governor and Council, and not to the Governor. The "executive" was the Governor with the advice and consent of his Council.

So Governor Kent, in his message of March 12, 1835, uses the word executive as equivalent to and meaning Governor and Council.

But it is unnecessary to give additional illustrations of the use of the word Executive by all the different Governors who have been called to administer the affairs of the State.

The same word may have different meanings, and different words or forms of expression may be used to convey the same idea. The various statutes in relation to officers appointed by the Governor by the advice and consent of the Council, enacted in the early days of the government, as well as since, adopt different language to express one and the same meaning. Thus, by ch. 148, of the acts of 1821, "the Governor, with the advice and consent of Council," was empowered to appoint an Inspector General of beef and pork, "to be by them removable at pleasure." By ch. 175, they were authorized to

appoint an Indian Agent, "during pleasure." By ch. 177, they were authorized to "appoint and commission" pilots, whom they might suspend or remove "at their discretion."

By ch. 54, of the acts of 1820, they were authorized to appoint a Reporter "removable" at the pleasure of the executive. "The Bank Examiner is appointed by the Governor with advice of Council" and holds his office by R. S., ch. 47, § 54, "subject to removal at any time by the appointing power."

Coroners by R. S., ch. 80, § 40, "hold their offices according to the provisions of the constitution." By R. S., ch. 142, § 1, the Trustees of the State Reform School are to be appointed by the Governor with the advice of the Council, "to hold their offices during the pleasure of the Governor and Council," but not more than four years under one appointment.

In some instances the statute says nothing in relation to removal, but that would not affect the right to remove.

Most of these offices were created at the commencement of the State government. But notwithstanding this varying use of language, it was unquestionably the intention of the Legislature to place the power of removal in the Governor by the advice and consent of his Council. It was so understood by those administering the government, when the offices named and others with varying language as to removal were created, for in all instances the commissions were issued and signed,—the respective officers being removable at the pleasure of the Governor and Council.

In some instances, in the different revisions of the statutes, the language as to removals has been changed from one form of expression to another—the different forms being regarded as equivalent and identical in their meaning—the revisers not being authorized to change the law.

By ch. 90, of the acts of 1821, the Governor and Council were authorized to appoint and commission Fish Inspectors, to hold office "during *his* pleasure," and the first commission was issued "during the pleasure of our Governor." This, it is believed, is the only case where an appointment by the Governor and Council was made removable by the Governor.

By ch. 257 of the acts of 1824, it was enacted, "That ALL civil officers, appointed and commissioned by the Governor and Council, or who shall be hereafter commissioned by the Governor and Council, whose tenure of office is not otherwise

provided for or limited by the constitution, shall hold and exercise their respective offices for the term of four years and no longer, unless re-appointed: Provided, however, that this act shall not be so construed as to prevent the Governor, with the advice of Council, from removing any such officers within the term of four years; and this act shall not extend to such ministers of the Gospel as are or may be appointed and commissioned to solemnize marriages; or to such as are or may be commissioned by the *Governor* before whom certain judicial, executive and civil officers are required by law to take and subscribe the oaths or affirmations required by the constitution."

The Reporter is a civil officer appointed and commissioned by the Governor and Council. His "tenure of office is not otherwise provided for or limited by the constitution." He is, therefore, by the express terms of the statute to hold for four years, "unless re-appointed." He may by the *proviso* be removed, by "the Governor with the advice of the Council," and not otherwise. The statute is general and applies to ALL civil officers. The exceptions from this statute are specially named "the cases provided for, and limited by the constitution,"—are Judges whose tenure was during good behavior,—to the age of seventy—Justices of the Peace, and Notaries Public for seven years if they so long behave themselves well. The act embraced within its terms, the office of Reporter, who originally was "removable at the pleasure of the executive." It affirms by necessary and inevitable implication the correctness of the construction first given as to the removability of the Reporter, for he is within the obvious words of the act.

This act was passed in the administration of Gov. Parris, a learned and able Judge and an influential member of the constitutional convention. In the case of Fish Inspector—an officer appointed by the Governor with the advice of the Council, to hold at the Governor's pleasure, the commission was changed, and the appointee held his office for four years, removable at the pleasure of the Governor by advice and consent of the Council.

This act with slight alterations by way of condensation and not intended to effect any change is found in R. S., ch. 2, § 84. The original enactment was passed for the purpose of

establishing uniformity in the duration of official life. It applies to *all*, "whose tenure of office is not otherwise provided for by law or limited by the constitution." It applies to the office of Reporter equally as to other offices. There is no statute taking this office from its operation. There is no reason why there should be such a statute.

In all cases where the Governor appoints with the advice and consent of the Council, they remove. When the appointing power is in the Governor alone, he may remove.

The contemporaneous construction given to the statute adopted and uniformly followed by the series of able and upright men, who have administered the affairs of the State, has been in accordance with law and with the undoubted intention of the Legislature. Neither negligence, ignorance nor imbecility is to be imputed to them. Indeed, as is forcibly remarked by Parker, C. J., in Packard v. Richardson, 17 Mass., 144, a contemporaneous is generally the best construction of a statute. It gives the sense of a community of the terms made use of by a Legislature.

If there is ambiguity in the language, the understanding and application of it, when the statute first comes into operation, sanctioned by long acquiescence on the part of the Legislature, is the strongest evidence that it has been rightly explained in practice. This is well established law.

To the questions proposed — we answer:

1. That the Reporter does not hold his office at the will and pleasure of the Governor alone, and is not removable by him.

2. That he is removable only by the Governor by and with the advice and consent of the Council.

JOHN APPLETON.
W. G. BARROWS.
JOHN. A. PETERS.

We concur in the opinion, that in the section of the statute defining the tenure of office of the Reporter of the decisions of the Law Court, R. S., ch. 77, § 28, the words "the executive" are employed to embrace, in one general term, both the Governor and Council, who had been mentioned together in the earlier lines of the section, and to indicate the executive authority by which the appointment is made; that the phrase "who shall hold his office during the pleasure of the executive," contemplates the same mode of executive action and procedure in effecting a removal, as in making an appointment; and that neither from the letter, reason nor history of the statute, nor from a comparison of it, with those in *pari materia*, can a just inference be drawn of an intention to divide the removing from the appointing power.

We think the section substantially re-enacts, in this particular instance, the general constitutional provision that, "the tenure of all offices which are not or shall not be otherwise provided for, shall be during the pleasure of the Governor and Council," and that it was not intended that the former, who has only the power to nominate for appointment, shall be able alone to create a vacancy which he has not the power to fill without the action of the latter.

WM. WIRT VIRGIN.
J. W. SYMONDS.
CHAS. DANFORTH.

The undersigned, Justice of the Supreme Judicial Court, having taken into consideration the question propounded to the Justices of said court by the Executive Council of this State, and the statement of facts accompanying it; and having given them careful and mature examination, respectfully submits the following answer:

By the constitution of this State, article 6, section 3, the Justices of said Court "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Council, Senate, or House of Representatives." The question propounded must be an important question of law, and the occasion upon which it is

put must be a *solemn occasion*, to justify the Justices of the Court in giving an opinion. The question may be an important question of law, but if the occasion is not a solemn one within the meaning of the constitution, it should not be answered.

I respectfully submit, with great deference to the opinion of the other Justices of the Court, that the occasion upon which the question is propounded, as shown by the statement of facts, is not a solemn occasion within the true meaning of the constitution.

The object of the clause of the constitution under consideration appears to me to be to enable the Governor, Council, Senate, or House of Representatives, to obtain the advice of the Justices upon any important question of law, of public concern, which the body making the inquiry has occasion to consider and act upon in the exercise of the legislative or executive powers intrusted to them respectively, for their guidance in their action.

It does not contemplate that one branch of the executive or legislative department may properly put to the Justices, questions in regard to the power of another to do an act performed by it, or as to the legal effect of such act, in the performance of which the body putting the question was not requested to act, and upon which it can not be required to act. It can not be that it contemplates that the Senate or House of Representatives may propound questions in regard to the power of the Governor to remove officers from office, or as to the legal effect of an attempted removal, upon which it can in no event act. Nor does it appear to me that it contemplates that the Council may require the opinion of the Justices, as to the legal effect of the action of the Governor in assuming to remove an officer from office without their consent. In doing so they would require the Justices to determine the rule by which the Governor should be controlled in his action in matters upon which he does not require their advice or action, without his consent, and against his protest. The fact that the Governor acted alone precludes the idea that the Council can be required to join in the same act. It may be said that they may be required to act with the Governor in making a new appointment to the office. If they should be they must exercise the duties of their office

according to their judgment. The attempted removal by the Governor in no way affects their constitutional powers or duties. It is their duty to act in some way on all nominations made by the Governor. If one should be made in place of Mr. Spaulding, and they desire his removal, they can easily accomplish it by confirming the nomination, and then the question of the power of the Governor to remove alone will be of no consequence. If they do not desire his removal, and doubt the power of the Governor to remove without their consent, they can decline to confirm, until Mr. Spaulding's right to the office can be judicially determined by the Court. In the mean time the public interest will not suffer.

By the papers sent up it appears that Mr. Spaulding denies the power of the Governor to remove him without consent of the Council, and claims the right to discharge the duties of the office, while thus exercising them under color of his commission, and with a claim of right to do so, he is an officer *de facto*, if not *de jure*, and by the well established rule of law, so far as the public are concerned, his acts will be as valid and binding in the one case as in the other. Belfast v. Morrill, 65 Maine, 580. Sheehan's case, 122 Mass., 445.

There is another reason why the question is one upon which the Justices are not required to give their opinions. It is a pure question of law whether, by the act of the Governor, Mr. Spaulding was legally removed from the office of Reporter of Decisions. It involves his title to the office. It is a question upon which both the State and the officer have a right to be heard before a final judgment is pronounced. The proper process in which the question can be judicially tried and determined, is the writ of *quo warranto*, which may be sued out at any time by the Attorney General; and in it each party would be properly before the Court, could be represented and heard, and a final judgment could be rendered.

If the Justices should answer that the Governor had the power to remove as claimed by him, and that Mr. Spaulding was legally removed, it would not be binding upon him as he has had, and can have, no opportunity to be heard in the matter; and it would violate every principle of law and justice to judicially determine the right of an officer to his office without giving him an opportunity to be heard—and if

the answer is against the power of the Governor, it would not be binding upon the State, for the Attorney General might at once bring the writ of *quo warranto*, and the Court would be obliged to hear the parties and determine the question judicially. The Court should not prejudge the case without a hearing in the proper process, unless the occasion is so solemn as to require it, to avert some public injury.

If the Justices are obliged to answer the question sent up, it is not perceived why they may not be obliged to answer any question put upon a statement of facts, by the Council involving the title of a sheriff or other elective officer to his office, on the ground that if there is a vacancy it would be the duty of the Council to act with the Governor in filling it—and thus introduce a new mode of trying the right of the officer to his office.

The case is very similar to that in which the Court in Massachusetts declined to answer the questions propounded by the House of Representatives in 1877. Opinion of the Justices, 122 Mass., 600.

I am, therefore, of opinion that the question ought not to be answered. But although my judgment leads me to this conclusion, my confidence in its correctness is somewhat shaken by the fact that so many of the other Justices of the Court are of a different opinion. In cases of doubt it may be the duty of the Court to yield in favor of the prerogative of the body propounding the question. The Justices of the Court in Massachusetts have twice recognized this duty, and answered under protest. 5 Met., 597; 9 Cush., 604. Inasmuch as any opinion now given can have no effect if the matter should be judicially brought before the Court by the proper process, and lest in declining to answer, I may omit the performance of a constitutional duty, I will very briefly express my opinion upon the question submitted.

I concur in the result of the opinion of Chief Justice Appleton and Justices Barrows and Peters; but not in all the propositions and arguments upon which the result is reached.

By the constitution of this State, article 9, section 6, "The tenure of all offices which are or shall not be otherwise provided for shall be during the pleasure of the Governor and Council."

The office of Reporter of Decisions was created by act of 1820, chapter 54, section 9, which provided that the officer "shall be removable at the pleasure of the Executive."

This provision is substantially the same in the revised statutes. R. S. ch. 77, § 28. The word "executive" has two well defined and recognized meanings; and as applied to our form of State government, one designates the Governor as the chief executive, or head of the executive department; the other embraces both the Governor and Council when they are required to act together in the execution of any executive power, and while the constitution (article 5, part first, section 1,) declares that the supreme executive power of the State shall be vested in a Governor, it uses (article 6, section 8) the words "executive power" as embracing both the Governor and Council.

Considering the question upon the act of 1820 alone, the question arises, in which sense did the Legislature use the word "executive"?

There is much in the early legislation of the State, and in the interpretation of the word "executive" and "executive authority" as they occur in the constitution of the United States, and the statutes of this State, by the several departments of our government, upon which an argument may be based in support of either construction; and after a careful consideration of the question in all the lights drawn from these sources, it appears to me to be very doubtful whether the Legislature in said act used the word "executive" as designating the Governor alone, or the Governor and Council. It was undoubtedly competent for the Legislature to give the Governor alone the power of removal; but if such intention is not clearly expressed in the statute, then the tenure of the office must be determined by the constitutional rule before quoted. But there is another statute which it appears to me conclusively settles the question—R. S., ch. 2, § 84. This statute is derived from the act of 1824, ch. 257, which reads as follows: "That all civil officers appointed and commissioned by the Governor and Council, or who shall hereafter be commissioned by the Governor and Council, whose tenure of office is not otherwise provided for or limited by the constitution, shall hold and exercise their respective offices for the term of four years and no longer,

unless re-appointed: *Provided, however*, That this act shall not be so construed as to prevent the Governor with the advice of Council from removing such officer within said term of four years; and this act shall not extend to such ministers of the Gospel as are or may be appointed and commissioned to solemnize marriages; or to such magistrates as are or may be commissioned by the Governor, before whom certain judicial, executive and civil officers are required by law to take and subscribe the oaths or affirmations required by the constitution."

The provisions of that act have been brought down through the revisions of 1840 and 1857, to the Revised Statutes before cited, with no change of language indicating an intention of the Legislature to change the meaning, except a change in the phraseology designed to except from the operation of the statute certain offices created by statute with a tenure for a fixed term other than four years.

Under the provisions of the act of 1824, if the tenure of the office of Reporter of Decisions was determined by the constitution, then the Governor had no power to remove without the consent of the Council. If not, and the Reporter was removable at the pleasure of the Governor under the act of 1820, then the tenure of the office was not "otherwise provided for or limited by the constitution," and became subject to the provisions of said act of 1824, and by it was fixed at four years unless sooner removed by the Governor with advice of the Council.

The acts of 1820 and 1824 remained without change till the revision of 1840, and up to that time the act of 1820, so far as the tenure of the office was concerned, was modified and controlled by the act of 1824. The provisions of both acts, having been incorporated into the revisions of 1840, 1857 and 1871, by a well settled rule of construction, they must receive the same construction as before the revisions, Hughes v. Farrar, 45 Maine, 72. French v. County Commissioners, 64 Maine, 583.

This has been the uniform construction put upon these statutory provisions by the executive power of the State from 1824 down to this year.

Mr. Greenleaf was appointed Reporter in 1820, under the act of that year creating the office, and by the terms of his

commission was to hold the office during the pleasure of the Governor and Council. After the passage of the act of 1824, and at the end of four years from his first appointment he was re-appointed, and by the terms of his commission, was to hold the office for four years unless sooner removed by the Governor and Council as provided in that act. The same form of commission, so far as the tenure of the office is concerned, has been continued ever since, and every Reporter who has held the office for more than four years in succession has been re-appointed at the end of said term.

I think this construction of the statutes, so long sanctioned, is the correct one, and that the Reporter of Decisions must be appointed and commissioned for the term of four years unless sooner removed by the Governor with advice of Council, and that the Governor has no power to remove him without advice of the Council.

I therefore answer the question propounded in the negative.

ARTEMAS LIBBEY.

I concur in the foregoing opinion prepared by Judge Libbey.

C. W. WALTON.

To the Honorable, The Council of Maine.