70 Me. 570
Supreme Judicial Court of Maine.

STATEMENT AND QUESTIONS SUBMITTED WITH THE ANSWERS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT THERETO.

Jan. 12, 1880.

****1** ***570** 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 November 17, 1879. Application in proper form was made by parties interested for inspection of said retu rns 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 ***571** 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 in said return was that it contained the words and figures-- "Scattering, one hundred and forty-three, 143," but this number if added or subtracted 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 representatives 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 ***572** 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 persons 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 Samuel H. Beal, a person who was not elected and did not appear to be elected by said returns.

****2** 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 ***573** 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 classe??d 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 co??rrected 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 ***574** 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.

****3** 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, ***575** 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 three 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. Gole 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.

****4** 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 ***576** 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 ***577** as scattering. The return from Otisfield omitted to state the whole number of ballots. In the return from Westbrook 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.

****5** 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 ***578** 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 roll as required by law, but this they refused to do.

****6** 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 W. Woodcock, Harper Allen, Joshua E. Jordan, F. W. Hill, James W. Clark, James Flye, John H. Brown, James M. Leighton and Stephen D. Lord, ***579** 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 ***580** 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.

****7** 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 ***581** 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 Burnam 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 ***582** 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.

****8** 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 uncorrrected 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:
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 ***583** 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 an usurpation of authority, and must be held void. It only remains to apply those principles to the subjects embraced in the questions propounded.

****9** 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 summons 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 ***584** 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 of 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. Rolf 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, ***585** 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.

****10** 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 issued in violation of law.

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 ***586** 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 appears 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.

****11** 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 ***587** 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 Robbinston, 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 by chapter 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 ***588** 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.

****12** 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 ***589** 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?

****13** 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.

***590** 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 ***591** 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.

****14** 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, §§ 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 (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 ***592** 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?

****15** Is anarchy to triumph? Can the government be destroyed or its action paralyzed 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 contemplation 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 v. 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: ***593** 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 ***594** of any other qualifying oath than that which he has taken in his office of senator.

****16** The answer to the sixteenth question renders a reply to the seventeenth 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 eighteenth 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., c. 2, § 25. A motion was seasonably made that these members appearing 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.

***595** 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.

****17** 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 representations 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 ***596** 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 determine 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.

****18** No rights should be lost by those who seasonably assert them, ***597** and appeal to the constitutional tribunals instead of resorting to force.

QUESTION 23. Can the seventy-six (76) members elect, enumerated in question 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 art. 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 ***598** 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.

****19** 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.

***599** 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 v. 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 jurisdiction, 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 difficulties 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. LOOKE, *President of the Senate,* and GEORGE E. WEEKS,
Speaker of the House of Representatives,

Augusta, Maine.

All Citations

70 Me. 570, 1880 WL 10520