

DODD EX PARTE.

The 3d and 4th sections of the act of the 30th December, 1848, to distribute the Internal Improvement fund among the counties, provide, that on the first Monday of May, 1849, and every two years thereafter, the qualified voters of each county shall elect internal improvement commissioners; and that when any vacancy shall occur in the office of commissioner, by death, resignation, or otherwise, the presiding judge of the county court shall order an election to fill such vacancy. No election was held in the county of Saline on the first Monday of May, 1849, but, under an order of the county court, an election was held on the 2d Monday of November, 1849, for such commissioner. HELD that the election was void—that no vacancy within the meaning of the act could occur which could be filled by order of the county court, until the office had been filled by a previous election, under the provisions of the act.

Application for Mandamus.

At the present term of this court, David Dodd presented a petition for mandamus, stating that on the second Monday of November, 1849, by virtue of an order of the county court of Saline county, after due notice, an election was held in said county for five internal improvement commissioners, under the provisions of the act of 30th December, 1848, to distribute the proceeds of the 500,000 acres of land donated to the State, by act of Congress, for internal improvement; and that at said election Anderson Cunningham, petitioner, Green B. Hughes, Warren Holiman and Berry McDaniel were duly elected such commissioners.

That on the 7th January, 1850, petitioner was regularly elected

treasurer of said board of commissioners, and that he had duly qualified as such.

That under the provisions of said act, there was due the county of Saline, on the first Monday of July, 1849, the sum of \$434.72, as per dividend of said internal improvement fund, which was in the hands of the State Treasurer.

That on the 17th day of January, 1850, petitioner applied to the Auditor of Public Accounts for his warrant upon the Treasurer for the said sum of money so due the county of Saline, but he refused to issue it, alleging that the election of the board of internal improvement commissioners for said county was illegal and void, not having been held on the first Monday of May, 1849.

Petitioner alleges that under the 4th section of the act above referred to, the election of commissioners on the 2d Monday of November, 1849, was legal, and that he, as treasurer of such board, was authorized to receive the money aforesaid; and prayed a mandamus upon the Auditor to compel him to issue his warrant therefor. The Attorney General demurred to the petition.

WATKINS & CURRAN, for petitioner.

CLENDENIN, Attorney General, contra.

Mr. Chief Justice JOHNSON, delivered the opinion of the court.

The 3d and 4th sections of the act, under which the petitioner claims, provide, "That on the first Monday of May, 1849, and every two years thereafter, the qualified voters of each county shall elect five commissioners, who shall constitute a board of internal improvements for the county; said election to be held at the places, in the manner and on the notice now prescribed by law for general elections," and "That when any vacancy shall occur in the office of commissioner by death, resignation or otherwise, it shall be the duty of the presiding judge of the county court to order an election to fill such vacancy, giving at least twenty days notice of the time and place of holding the same by putting up at least one advertisement in each township." It is

admitted by the petitioner that the election under which he claims did not take place on the first Monday of May, 1849, as required by the statute, but that it was held under an order of the county court on the 2d Monday of November of that year. The question is whether the election, under which the petitioner claims, was authorized under the circumstances of the case: or, in other words, whether an election could be legally held under the 4th section to fill vacancies, before the offices created by the act had been previously filed.

We consider it perfectly clear that the vacancies contemplated necessarily presupposed that the offices had been once filled, and that the provision for filling those vacancies was solely designed to embrace the unexpired portion of the term that might remain after the happening of such vacancy. This doctrine is fully borne out and recognized by the superior court of Judicature of the State of New Hampshire, in the case of *Johnston vs. Wilson et al.* The statute of that State provided "That if any town or place shall neglect or refuse to choose a collector or collectors, or shall refuse to fill up a vacancy in case the office be vacated, &c., in every such case the selectmen of such town or place shall and may make such choice or fill up such vacancy," &c. The selectmen of the town of Hillsborough, claiming to act under the authority of that statute, proceeded to appoint a successor to Johnston, without ever having called a town meeting, so as to give the citizens an opportunity of filling the vacancy. Upon that state of case, the court remarked, that "It is admitted that the plaintiff was duly appointed collector for the town of Hillsborough for the year A. D. 1817. He expressly signified his acceptance of the appointment, and consequently, unless he afterwards resigned the trust, there is no evidence of a vacancy in any other way, which either the selectmen or the town council could legally fill by a new appointment. We say "resigned," though it makes no difference in the argument or the case, whether the subsequent conduct of Johnson, after his express acceptance, be called a non-acceptance of the office (because he had not been sworn into it) or a resignation of the of-

office. For if it amounted to either, there would then exist a vacancy." In that case, although the party originally elected did not qualify by taking the oath of office, yet he expressly accepted it, and by such acceptance the court held the office to be filled. We are clear that, inasmuch as the offices created by the act had never been filled, no vacancies existed, and consequently the election held under the order of the county court was unauthorized. The application is therefore denied.