DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE,

DURING ITS SESSION

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1836.

SIXTEENTH LEGISLATURE.

No. 17. **HOUSE.**

The Committee on Contested Elections, to which was referred the certificates of John M. Noyes and William Haynes both claiming seats in this House from the District composed of the towns of Trenton and Eden, in the county of Hancock, have attended to the subject and ask leave to Report:

That at the meeting holden on the fourteenth day of Sept. 1835, the votes stood

	Noyes.	Haynes.		
Trenton,	43	35	John M. Noyes,	75
Eden,	32	39	William Haynes,	74
	—	—	Scattering,	4
	75	74		—
			Whole number of votes,	153
			Necessary for a choice,	77

At the meeting holden on the 5th day of October, the vote stood,

	Noyes.	Haynes.	Scatt.	Marked votes.
Trenton,	49	27	3	
Eden,	27	37	3	6
	—	—	—	
	76	64	6	

Whole number votes,	152
Deduct marked votes,	6
	146
Necessary for a choice,	74

At the meeting on the 26th of Oct. the vote stood,

	Haynes.	Scattering.
Eden,	11	6

The Committee are unanimously of opinion that no choice was effected at the first meeting, neither candidate having a majority of all the votes of the District legally given in and allowed.

At the second meeting, holden on the 5th of October, it was admitted before the Committee, that six of the votes given in, in the Town of Eden, were written upon paper ruled with red lines on both sides, which a majority of your Committee feel constrained to regard as "distinguishing marks," requiring the rejection of said votes, in pursuance of the law passed March 11, 1831. Five of these votes were for Stephen Higgins, and one for Robert Berry, and these votes being rejected, John M. Noyes is, in the opinion of a majority of your Committee, duly elected as the Representative from the District of Trenton and Eden, and should be admitted to his seat in this House.

The question presented in this case, is deemed by your Committee to be an important one, being called upon to give a construction, in the first instance, to a general law, of unquestionable importance in preserving the purity of the elective franchise. By reference to the law (Ch. 568, Sec. 3.) it will be seen that ballots are required to be on clean white paper, and "no ballot which shall be on colored paper of any description, or which shall bear *any distinguishing mark* or figures besides the names of the persons voted for, shall be received by any Selectmen or Assessors," and the Statute goes

on to fix a heavy penalty on the officer who shall receive them.

Votes which the Town officers cannot legally receive, cannot legally be counted and allowed.

The object of the law which requires the rejection of votes bearing "*distinguishing marks*" was obviously to secure the purity of elections, by securing to every elector, however humble in life, the right of voting as he pleases, free from the bias or control of the arbitrary and powerful, who might be disposed to oppress and punish, those who refused obedience to their will.

To place an effectual guard against corrupting freedom of opinion, it is wisely provided that a "distinguishing mark" shall cause the rejection of the vote; and that is a "distinguishing mark," whether it be a *red mark, black mark, figure or emblem,* which would enable the vote to be easily distinguished from an ordinary ballot on white paper, and enable the writer of the votes thus marked, to know them from others.

If *red* marks are not "*distinguishing marks,*" would any other color be? And if half a dozen *red* marks on each side of a ballot, do not bring it within the meaning of the Statute, would the case be different if the marks should be so multiplied that the whole vote should be red? If *red* marks are not "*distinguishing marks*" will it not be easy for any man who wishes to distinguish the votes he circulates, to do it by putting on *red* marks, by which he will distinguish who is true to him, though they should here be regarded as no "distinguishing marks?"

Your Committee cannot shut their eyes to the consequences which would result, and the encour-

agement to corruption and carelessness which would be given by a virtual repeal of the Act for preserving the purity of the elective franchise, which would follow from the admission of votes bearing "a distinguishing mark;" and while they are disposed to disfranchise no elector for neglect of public officers, when it is practicable to avoid it, they deem it due to the security and freedom of the elector, to set their faces against any practice, under cover of which, however innocent in itself, the corrupt may find opportunity to invade the freedom of the elective franchise.

Your Committee, therefore, report the following Resolve, which is herewith submitted.

VIRGIL D. PARRIS, Chairman.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, January 23, 1836.

Resolved, That John M. Noyes having been constitutionally and legally elected a Representative from the District composed of the towns of Eden and Trenton, in the County of Hancock, is entitled to a seat in this House.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES, }
January 27, 1836. }

The minority of your Committee on Elections having had under consideration the claims of John Noyes and William Haynes to a seat in this House, as Representative from the classed towns of Eden and Trenton, and having fully examined the evidence as presented in a statement by them signed and herewith submitted, now

Report, that they concur with the majority in the opinion, that the meeting in Trenton on the second Monday of September last was duly and legally warned; that the words twelve of the clock in the afternoon can and shall be construed to mean twelve of the clock at noon, inasmuch as this hour only could have been intended with a view to a time sufficient for the performance of those acts and duties required of the voters at a meeting of the character notified; and there being no uncertainty as to the day, the inhabitants must have understood the meeting to be called at noon of that day, and the restrictive word "after" having no sense, is to be rejected as a surplussage. They also concur with the majority in the opinion, that the delay to open the meeting till 3 o'clock did not vitiate the subsequent proceedings, the electors not having dispersed and no request having been made to open the meeting at an earlier hour, nor any motion put to choose selectmen pro tempore, by reason of refusal

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or neglect of duty on the part of the standing seceltmen. And they further agree with the majority that the absence of the alphabetical list at the meeting aforesaid did not operate to disfranchise the electors, as they regard the statute provision for such list merely directory. And in support of this position they would refer to the decision of the Supreme Court in the case *Mussy vs. White, et al.* 3 Gr. 297.

But the minority of your Committee do not agree with the majority that a choice was effected at the second meeting—or in other words, that the six votes written on ruled paper are now to be rejected as bearing distinguishing marks, within the third section of an Act regulating elections, passed March 31, 1831. The language of that part of said section bearing upon the question at issue is as follows—"And the ballots aforesaid shall be written in the mode usually called writing, or in that denominated printing, on clean white paper; and no ballot which shall be on colored paper of any description or which shall bear any distinguishing mark or figures, besides the names of the persons voted for, and the officers aforesaid, shall be received by any selectmen or assors on pain of forfeiting for each offence the sum of fifty dollars." It is assumed by the majority of your Committee that the Legislature intended by this provision to secure the freedom of elections—to put it out of the power of arbitrary men to substitute their will for the will of the voter, and compel him to cast the vote which they might give him under fear of detection and punishment if he should deposite a different one. For it is said that as the ballot bears no mark to distinguish it from all others it would be impossible to determine whether

it had been thrown or not. Now admitting this to have been the object of the Legislature it does not follow that the votes in question are within the remedy of the statute unless it appear that they are within the mischief. For surely it will not be pretended that any mark, however clearly accidental, would be sufficient to authorize its rejection. It would be grossly absurd to hold, for instance, that the flourish of the pen at the end of the name, a dash beneath it, or a blot, not in the least impairing its legibility, should disfanchise the elector. At any rate, a different construction has been very generally adopted, for in the case of printed votes, nothing is more common than to separate the different officers and candidates on the same ticket by a broad line or by brackets. And it is believed that no objection on this ground was ever made to such ballots. And, if the construction of the majority be correct, for the manifest reason that such marks furnish no proof of that unwarrantable attempt to control the will of the voter, which the statute is supposed to guard against. Now do the marks in question furnish any proof of such design? The votes were written on paper ruled with red ink on both sides. If paper of this description were but little used, the use of it on this occasion might raise a presumption of the criminal intent. But it is to be borne in mind that paper so ruled is in general use, and for many purposes is the most convenient. And a man whose fingers are more familiar with the plough handle than the pen, might very naturally and innocently prefer it for ballots as the lines would help to guide his hand. It is also to be recollected that there were six votes cast of the same description. If they were all written and distribut-

ed by one man, he could not have had in view the object supposed, for no one of them is distinguishable from the rest. If they were not written by the same individual, the only presumption is that such paper was common and was naturally used for ballots as well as for other purposes. Should it be agreed that this construction rests in the presiding officers, a discretion which may be abused, it may be said in reply, that for such abuse they would be liable and that on any construction they must be entrusted with discretionary power. The ballots are required to be on clean white paper. What is clean paper? and what is white? are questions for them to determine—and they may be nice and difficult questions. For as there are degrees of cleanness, so there are degrees of whiteness.

But the minority of your committe do not admit the object of the Legislature to be such as has been supposed. The most rigid construction of the Act so far from preventing the exercise of an undue influence over the will of the voter, has not even the tendency to restrain it. It will readily occur that ballots may be distinguished by being made unusual large or small, by being cut in a particular shape or folded in a particular manner. Besides there is nothing to prevent the name of the person and the officer from being written in any style from a charter, transversly or diagonally at the pleasure of the writer, and the vote might be as readily and as clearly identified by any peculiarity of this kind in the manner of writing as by any mark distinct and apart from it. It is charging the Legislature with folly to presume that they intended to effect an object which the Act has not even the tendency to ef-

fect—which from the very nature of things cannot be effected.

But it is believed that a reasonable intent is manifest and that by distinguishing marks and figures are meant only such marks or figures as constitute the badge of party. It is a familiar fact that men entertaining common sentiments on subjects of general interest are prone to adopt some continuous symbol which shall be emblematic of their sentiments. And it is apparent that a practice of introducing such badges to the polls by impressing them upon the ballots would tend greatly to augment the fury of political contests and open a wider door for fraud and imposition. It might well have become the Legislature to provide against the occurrence of such evils. And it is believed they have effectually done so by the provision aforesaid. Votes are not to be on colored paper, because different colors are frequently resorted to for the purpose of party distinction; nor are they to bear any distinguishing marks or figures, which excludes all badges, emblems or symbols. This construction does no violence to the language, while it supposes a beneficial and practicable intent, and is believed to be liable to none of those objections which apply to any other imaginable construction. In this view of the Statute, as there is no pretence that the marks under consideration were used as distinctive of party, they were rightly received and counted.

But should this view of the Statute be held incorrect, the minority of your Committee are of the opinion that the decision of the Selectmen was meant to be final, and that it is not competent for this House to reverse such decision. They do not

question the right of the House to throw out *illegal* votes though counted and declared by the presiding officers, but they deny that these votes are illegal. They regard the provision as directory—as prescribing the manner of voting and securing obedience by a penalty, but by no means tainting the vote. Such a position is in perfect harmony with the rules of construction adopted by the Courts. For example, by a Statute of Massachusetts, town officers were required to be qualified within a certain number of days after being notified of their election, yet the Selectmen were held to be duly qualified and their acts binding though the oath of office was not administered within the time prescribed. 10 *Mass. Rep.* 105.

By the Statute regulating marriages, the intentions of the parties are required to be published and a certificate of such publishment to be furnished to the officiating magistrate, yet if the ceremony be performed without these requisitions having been complied with, the marriage is nevertheless valid, and the only consequence is that the magistrate exposes himself to the penalty.

But the case of Mussey vs. White, and als. before referred to, is still more in point. In this case it was attempted to set aside the doings of a town meeting because there was present no alphabetical list of voters as required by the Statute. But the Court held clearly that the absence of such list did not vitiate the proceedings of the meeting, did not render illegal the votes which were thrown although the Statute expressly provides (and the Court cite the provision) "that no person shall be permitted to give in his vote or ballot at any meeting for the

choice of town officers, until the person presiding at such meeting shall have had opportunity to inquire his name and shall have ascertained that the same is on the list aforesaid." Now his name could not be ascertained to be on a list which in fact had no existence. Yet the Court held the Statute directory and the votes legal, though the directions of the Statute had not been complied with. So in this case, the Statute does not create a new right, it merely regulates the exercise of a right previously existing. If these regulations have not been complied with, the consequence and the only consequence is that the Selectmen have exposed themselves to the penalty. The Statute here opens its force and reaches no farther.

The minority of your Committee are therefore of opinion that there was no choice effected at the second meeting, and that William Haynes having had a majority of all the votes thrown in the District at the third meeting was duly elected Representative of that district, and is entitled to a seat in this House.

H. W. PAINE,
THOS. C. LANE,
ELISHA H. ALLEN.

STATE OF MAINE.

HOUSE OF REPRESENTATIVES,
January 27th, 1836.

Read and ordered to lie on the table, and that three hundred copies, together with the Report of the Majority on the same subject be printed for the use of this House.

[Extract from the Journal.]

Attest, JAMES L. CHILD, CLERK.