

# MAINE STATE LEGISLATURE

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DOCUMENTS

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THE LEGISLATURE

OF THE

STATE OF MAINE.

1864.



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1864.

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# FORTY-THIRD LEGISLATURE.

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HOUSE.

No. 7.

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## REPORT.

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The Committee on Elections, to whom was referred the remonstrance of Henry K. Bradbury against the claim of Henry A. Usher to a seat in this House, as Representative from the district composed of the classed towns of Waterborough and Hollis, have attended to that subject and ask leave to submit the following unanimous report:

At the organization of the House, Mr. Usher produced a certified list of the votes of the town of Hollis for Representative, attested in the usual form by the selectmen and town clerk, and Mr. Bradbury produced a like certified list of the votes of the town of Waterborough, both of which were delivered to the Committee on credentials.

Mr. Usher also put in a certificate signed by two of the selectmen of Hollis, to the effect that they had met at the time and place understood by them to have been agreed upon as the place of meeting, for comparing the list of votes in the district, and the selectmen of Waterborough failing to appear, with their list, they declared Mr. Usher duly elected. Upon this statement, the House allowed Mr. Usher to take a seat.

By the list of votes of the two towns, certified in the manner prescribed in the constitution, the vote appeared to stand thus:

	Usher.	Bradbury.
Waterborough, . . . . .	191	278
Hollis, . . . . .	217	181
	<hr/>	<hr/>
	408	459

Leaving a majority of 51 for Mr. Bradbury.

The first question that arose was, whether there had been any time and place fixed upon by the selectmen of the two towns for the comparison of the votes, as required by law. The remonstrant introduced several depositions tending to show that prior to the present year, no such time and place had been agreed upon, that the selectmen of Waterborough, the elder town, gave notice after the last election, of a meeting to agree upon such time and place, but not within the four days prescribed by the constitution.

The testimony on the whole, proved to the satisfaction of your Committee that no such time and place for the comparison of lists had been fixed by the selectmen of the towns, and as there was no such meeting of the selectmen of both towns, as was set forth in the certificate before named, it could not give any strength to the claim of Mr. Usher.

No such meeting for the comparison of the lists of votes having been held, the Committee next proceeded to consider the effect of such omission.

It seems to be well settled in analogous cases, that such omissions after an election has otherwise been made, cannot vitiate an election—that takes place on the day of election; and the great purpose of this comparison of lists is to ascertain by an inspection of the papers on their face, who appears to have a *prima facie* right, and whether another meeting is necessary or not. We regard the provisions of the constitution and of the statute on this point as clearly directory and not mandatory. This House is the judge of the election of its members, and can go behind all these regulations to inquire and ascertain who is in fact elected.

Another question of greater importance next claimed the attention of the Committee.

By the vote of Waterborough, as returned in the certified list aforesaid, it will be seen that there were in the aggregate for both candidates, four hundred and sixty-nine votes. It was proved to the satisfaction of the Committee, that a check list was kept, and the voters' names checked as they voted, and that only four hundred and thirty-two names were checked, leaving a discrepancy between the check list and returns, of thirty-seven votes. It was proved that one challenged voter was allowed to vote whose name was not on the list. There was no proof offered to show that any voter's name was checked on the list, who had not voted, but the testimony introduced by both parties satisfied your Committee that

four hundred and thirty-three votes were honestly cast in that town on that day. Here, then, the Committee find 36 votes in the ballot box that ought not to be there. There was no evidence offered by Mr. Usher or by the other side, bearing upon the question as to the manner in which the surplus thirty-six votes got into the ballot box, or how the discrepancy arose between the check list and the ballots returned. How came they there? The law requires (Revised Statutes of Maine, chap. 4, sec. 21) that the selectmen shall keep and use a check list at the polls during the election, and have and use suitable ballot boxes, and that no vote shall be received, unless delivered by the voter in person, nor until the presiding officers shall be satisfied of his identity, and shall find his name on the list, and mark it, *and ascertain that his vote is single*. Had the selectmen of Waterborough honestly and faithfully discharged that duty there would have been but four hundred and thirty-three ballots in the box. There seems to have been, and must have been, a degree of carelessness, to use no harsher term, highly reprehensible on their part, or this state of things would not have existed. And yet the testimony in the case does not warrant your Committee in finding them guilty of stuffing the box themselves. Fraud is to be proved, and not presumed. It appears in the case that the meeting was held in a meeting-house, that the selectmen stood in the desk, and that they very improperly permitted other persons than themselves to pass in and out of and to remain in the desk, and near the box, which had no cover or slide upon it. Charity to the officers of the town, acting as they were, under oath, perhaps, requires that we account for the surplus votes upon the theory that some ill-disposed person, other than themselves, improperly having access to the desk and the box, deposited the ballots there without their knowledge or consent.

Now, then, the effect of these thirty-six illegal votes in the box is next to be considered. They must not be counted. Shall they be rejected from the count, or shall the town be disfranchised and the whole vote counted out? Shall the honest voters of a town, at a legal meeting, properly called and held so far as they are concerned, having honestly voted, be disfranchised, and deprived of the highest privilege and the dearest and most sacred right of the citizen under a republican form of government, through the fraud of any knave who has the adroitness to thrust one, two, ten or

more fraudulent votes unseen into the ballot-box? The Committee think not. It would be wrong in principle, as, carried out, it might lead to the disfranchisement of a State, and leave it without a government. Happily we are not without precedent in this case. The question here presented is not a new one. It seems to have been considered and settled in courts, in analogous cases, in Legislatures in the different States, in the Congress of the United States, and in the British Parliament, and were your Committee inclined to doubt the correctness of the principle, they would hardly feel authorized to set aside or undertake to overturn a principle that must now be regarded as so well settled. It is this,—that illegal votes are to be thrown out, and not that the whole vote is to be set aside on their account, unless the counting of the illegal votes would change the result of the election.

Many authorities could be cited to this point, but the following will be deemed sufficient, viz. :

Reports of Massachusetts Contested Elections in cases Western, p. 144; Charlemont, p. 261; Tyringham, 266; Marblehead, 295; Ashland, 583; and *Blanford v. Gibbs*, 2 Cush. 39, and in what may be regarded as a leading case, settled by the Massachusetts Court in *Sudbury v. Stearns*, 21 Pick. 148. In that case sixty-three illegal votes were cast at a parish meeting, and the Court were called upon to pass upon the effect of these votes upon the meeting, and they held that the reception of the illegal votes did not necessarily vitiate the proceedings,—that the Moderator who admitted them, if he acted corruptly, could be punished, and so of the men who threw the votes, but the meeting being legal in its inception, the legal voters should be protected in the exercise of their elective franchise.

We now quote the language of the Court: "It is no objection to an election that illegal votes were received unless the illegal votes changed the majority. The mere fact of their existence never avoids an election. This is so plain a proposition that it needs no authority to support it. It is the principle adopted and acted upon in all cases of contested elections, whether in the British Parliament, the Congress of the United States, the Legislature of this or of any other of the United States. The burden of proof too is always upon the persons contesting the election."

The Committee would further cite the case of *Murphy* in 7th Cowan 153, in which it is laid down that "it must be made to ap-

pear affirmatively that the persons whose election is contested, received a number of illegal votes which, if rejected, would have reduced them to a minority. The mere circumstance that illegal votes were received will not vitiate the election. If this were otherwise, hardly any election in the State could be sustained." Angell & Ames on Corp. 72.

Applying this principle to this case, it remains to be seen how the rejection of the illegal votes will affect it. There is no evidence of course as to whether these votes were thrown for Mr. Bradbury or for Mr. Usher, but calling them all as thrown for Mr. Bradbury, and he would then be elected by fifteen majority of the honest votes thrown in the class. Such is the conclusion to which your Committee are forced by the evidence in this case, and they therefore beg leave to submit the following resolve.

LEWIS BARKER,  
H. C. DAVIS,  
MOSES LOWELL,  
M. S. STAPLES,  
W. S. PEAVEY,  
H. L. WATTS,  
REUBEN MERRILL.

## STATE OF MAINE.

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RESOLVE declaring the election of Henry K. Bradbury.

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*Resolved,* That Henry K. Bradbury, having been  
2 duly elected as the representative of the classed  
3 towns of Waterborough and Hollis; is entitled to a  
4 seat in this house.



STATE OF MAINE.

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IN HOUSE OF REPRESENTATIVES, }  
February 17, 1864. }

On motion of Mr. FARWELL of Rockland, 350 copies ordered  
to be printed for the use of the Legislature.

HORACE STILSON, *Clerk.*