# DOCUMENTS

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# THE LEGISLATURE

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# STATE OF MAINE.

# 1864.

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1864.

# FORTY-THIRD LEGISLATURE.

SENATE. No. 6.

## REPORT.

The Committee on Senatorial Votes, having already presented their report upon all the Senatorial Districts of the State, except the eleventh, (comprising the county of Lincoln,) now beg leave to submit to the consideration of the Sentate, their report upon that district.

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| The whole number of votes as returned into the office of the Secretary of State, was . . . | | 5,226 |
| Necessary to a choice, . . . . . | | 2,614 |
| Everett W. Stetson has, . . . | 2,344 | |
| E. W. Stetson " . . . | 264 | |
| Everett Stetson " . . . | 17 | |
| | 2,625 | |
| Joseph E. Smith has . . . | 2,462 | |
| Joseph Smith " . . . | 138 | |
| J. E. Smith " . . . | 1 | |
| | 2,601 | |

Counting these votes for the respective parties for whom they were evidently intended, and Everett W. Stetson appears to be elected.

But Mr. Smith claimed that the return of votes from Boothbay was erroneous. By that return it appeared that 138 votes were thrown for him in that town. He claimed that, in fact, his vote was 178; and he offered to introduce a copy of the original record of the vote on the town books, attested by the clerk of Boothbay.

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The counsel for Mr. Stetson objected to any evidence contradicting the return, and contended that the recitals therein were conclusive. The Committee, however, held otherwise, and admitted the evidence offered. The full record of votes in Boothbay was as follows:

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| For Samuel Cony, (for Governor,) . . | 232 |
| Bion Bradbury, " . . | 178 |
| Everett W. Stetson, (Senator,) . . | 232 |
| Joseph E. Smith, " . . | 178 |
| Joseph Cargill, (County Commissioner,) | 232 |
| Robert Spring, " " | 178 |
| Leonard McCobb, (County Treasurer,) . | 225 |
| Edmund B. Bowman, " " . | 179 |
| Samuel Tarbox, (Representative,) . | 231 |
| Henry Fowle, " . | 178 |

The Committee regard the evidence as clearly establishing the fact that Mr. Smith's vote in Boothbay was 178, instead of 138, as returned.

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|---|---|
| Correcting the error, the whole number of votes in the district is . . . . . | 5,266 |
| Necessary to a choice, . . . . . | 2,634 |
| Joseph E. Smith has . . . . . | 2,641 |
| Everett W. Stetson has . . . . . | 2,625 |

And Mr. Smith appears to be elected.

But Mr. Stetson claimed that of the 312 votes for Mr. Smith in the town of Bristol, 28 were thrown by persons living on Muscongus and Marsh islands; that these islands are not within the limits of Bristol, but are situate in Muscongus bay, more than a mile east of the eastern boundary of the town, as described in the act of incorporation. And he contended that the inhabitants of these islands had no legal right to vote in Bristol.

He also alleged that four persons living on Hungry island in the north part of the same bay, voted for Mr. Smith in Waldoborough; and he contended that this island is not a part of Waldoborough, and that its inhabitants had no right to vote there.

He also alleged that a large number of illegal and fraudulent votes were thrown for Mr. Smith in Waldoborough itself.

Upon these several allegations, the parties have been fully heard by the Committee, and they proceed to state the facts proved, and their conclusions thereon.

I. It appeared from the evidence introduced by both parties, that 31 votes were thrown in Bristol by persons living on Muscongus and Marsh islands; 28 for Mr. Smith, 3 for Mr. Stetson. That the inhabitants of these islands have voted in that town without objection for a period as far back as the oldest man on them can remember. Robert Loud testified that he is eighty years old, was born on Muscongus island, and has always lived there; that he had probably voted there fifty times, and his vote was never challenged or objected to, and that he never voted anywhere else; that he had paid taxes all his life in Bristol down to within sixteen or seventeen years, and his father did before him, and that he never heard of any objection to the islanders voting in that town. But no jurymen had ever been drawn from the island by the town authorities.

It was admitted by both parties, that, in fact, no taxes had been assessed on the islanders for twenty-one years past, and none had been paid by them during that period. But the parties disagreed as to the reason why. It was contended by Mr. Smith that an agreement was made between the town authorities and the islanders, that the latter should support their own schools and paupers, and should not be taxed by the town if they did so. And he introduced two of the present board of selectmen, Mr. Blaney and Mr. Morton, as witnesses. Mr. Blaney testified that "it was common report that it cost more to assess and collect the taxes on the island, than they were worth, and that the islanders agreed to support their own schools and poor, if we would not tax them. That the property of the islanders has not been included in the inventory or valuation of the town for sixteen years and more; and no school money is given them." Mr. Morton testified that he "had understood there was a prior agreement by which the islanders were to take care of their own poor and support their own schools, and we were not to tax them. Their names have always been on the list of voters, but are kept by themselves at the end of the list of town voters. Their names are not in the jury box."

On the other hand Mr. Stetson contended that the islanders had not been taxed for 21 years, because they refused to pay. That the last assessment was in 1842, and they refused to pay it, on the ground that they did not belong to Bristol, and Bristol had no right or power to tax them. That the assessment of that year had never been paid, and none had been made since.

And he introduced Mr. Erskine who testified that he is "sixty-

five years old; was one of the assessors of Bristol in 1842, and went upon the island in the spring of that year to take the valuation, as had been the custom. Had a conversation with Mr. Robert Oram, one of the principal islanders, relative to the right of Bristol to tax them. Told him I did not suppose I had any right to take the valuation, but as it had been the custom I should do so. He said in reply that he should pay no tax if we had no right to tax him, and he should consult counsel about it. I took the valuation and we assessed the tax; but he subsequently told me he had taken counsel, and was satisfied that the island did not belong to Bristol and he should pay no tax And he did not. Nor did any of the islanders that year; nor has the tax been paid, to my knowledge; nor has any assessment been made on them since, so far as I know, or have ever heard. I never heard of the arrangement mentioned by Mr. Blaney, until since the September meeting. Never knew any of the islanders to serve as jurymen. Don't think I ever heard anybody contend that the island is a part of Bristol, until since that meeting. Have heard it said it was not a part of it. Never knew any objection to the islanders voting in Bristol. Their names have usually been entered on the same check-list, but on a part by themselves, at the bottom of the list."

It will be perceived that neither Mr. Blaney nor Mr. Morton have any personal knowledge of the alleged agreement between the town authorities and the islanders. They state only what they had heard from others. On the other hand, Mr. Erskine testifies from his personal knowledge, that the islanders refused to pay the tax of 1842, on the express ground that they did not belong to Bristol, and Bristol had no right to tax them. And it is admitted by all parties that they have neither been assessed nor paid a tax since.

Bristol was incorporated June 21, 1765. It is peninsula in form, jutting from the mainland southerly into Muscongus Bay; Pemaquid Point being its extreme southern limit, and Damariscotta river forming its western bound. The line on the North, as originally incorporated, commences near Salt Water Falls, in Damariscotta river, and runs southeasterly to a small cove in Muscongus Sound called Round Pond. This was the north east corner of the town. "From thence," is the language of the act of incorporation, "to run a southwesterly course to Pemaquid Point, as the shore lies; and from Pemaquid Point, as the shore lies, up Damariscotta river

to the first mentioned bound. And also all the islands lying within six miles from the main land to the south, between the aforementioned River Damariscotta and Pemaquid Point."

From the foregoing evidence and act of incorporation, Mr. Smith contended,

1. That Muscongus and Marsh Islands, by the act of incorporation, are part of Bristol.

2. That if upon the face of the act there is any uncertainty, the fact that the inhabitants of the islands have claimed to exercise, and have exercised the rights of citizens of that town, and that the town claimed the right to tax them, and did tax them, for more than three quarters of a century, should set at rest any question as to the construction of the act of incorporation.

3. That if the islands are not included within the limits of Bristol, the fact that the islanders have voted in that town from time immemorial, unchallenged, gives them, by prescription, the right to vote there.

The Committee have examined these several positions with the care which their importance plainly demands. The rights of parties here, and of the islanders themselves, required it. And they are opinion that the act of incorporation is free from all ambiguity. It makes the easterly shore the east line of the town. It then adds: "Also all the islands lying within six miles from the main land *to the south, between* the aforementioned *River Damariscotta* and *Pemaquid Point*,"—Pemaquid Point is *the southeastern* limit of the town; Damariscotta river *the southwestern*. The island of Muscongus lies a mile, at least, from the east line of the town, across Muscongus Sound. No part of it is *south* of the main land. No part of it lies *between* Damariscotta river and Pemaquid Point. On the contrary, it is *nearly six miles northeast of Pemaquid Point*; and a part of it is *farther north than the northeast corner of the town itself, as originally incorporated.*

The Committee entertain no doubt that the act of incorporation does not include the island of Muscongus. Marsh island is still farther east.

The fact that the inhabitants of these islands have voted nearly a hundred years in Bristol without objection, is one of great weight. And the Committee have felt the strongest desire to sustain their votes, if it could be done upon any legal principle.

Have they acquired the right so to vote, by prescription? In

the absence of any statute, or constitutional provision, perhaps a right to vote might be acquired by the immemorial exercise of it and by the payment of taxes for the support of government. So held in 1810, in the case of the unincorporated Gores of Oxford, (Mass. Election Cases, 75.) But if the exercise of such right originated under a statute, no prescriptive right could be acquired. For it is familiar law, that a right created by, and exercised under a statute, depends upon, and derives its validity from the statute, and not from custom, usage, or prescription. Did the islanders first vote in Bristol under the authority of a statute? The colonial history of Massachusetts leaves little room for doubt upon this subject. As early in that history as 1636 an ordinance was passed authorizing the inhabitants of unincorporated places to vote in the nearest town. Additional ordinances were passed in 1658 and 1692, and this right thus established, remained unaffected until the Constitution of Massachusetts was adopted in 1780. And the terms of these ordinances were regarded as broad enough to allow persons living in unincorporated places to vote in organized plantations. These ordinances were in full force in 1765, when Bristol was incorporated. Long prior to its incorporation, the territory was divided into three plantations, Pemaquid, Walpole and Herrington; and the inhabitants of all the adjacent islands, Muscongus, Marsh, Hog, Long and Harbor, voted with the inhabitants of the plantations, under the authority of the colonial ordinances above named, and the practice under them, and took part in their municipal affairs. The incorporation of Bristol produced no change in the habits of the islanders. The right to vote in the new town was secured to them by law, and they continued to exercise it without interruption. And down to 1828, when the town of Bremen was incorporated, the inhabitants of Hog and Long islands, which now make a part of that town, and which lie nearly north of Bristol, continued to vote in the latter town, although by no construction of its act of incorporation could they be regarded as included within it. By the Constitution of Massachusetts, an important change was made in the rights of persons living in unincorporated places. Its language was such as to exclude them from voting for Governor and Lt. Governor, while it allowed them to vote for *senators*, in the next adjoining town, if assessed in that town to the support of the government. Notwithstanding this change in the law, in practice they continued to vote for all State officers,

as they had before done, until 1807, when, in a closely contested election between Governors Strong and Sullivan, their right to do so was questioned; and the Supreme Court of Massachusetts held that the Constitution of 1780 excluded them from voting for Governor and Lieut. Governor. Opinion of the Justices, 3 Mass. Rep. 568. And in this opinion the Court also held that no person could vote except in strict conformity to the provisions of the Constitution.

Our own Constitution of 1820 adopts a more liberal rule. All qualified electors "living in places unincorporated, who shall be assessed to the support of government by the Assessors of an adjacent town, shall have the privilege of voting for senators, representatives and governor in such town; and shall be notified by the selectmen thereof accordingly." Constitution of Maine, Art. 4, Part 2, Sec. 3. And the Committee are of opinion that this provision of the Constitution must be regarded as controlling and regulating the whole subject matter. Whatever prescriptive rights might be acquired under the common law from immemorial usage, in the absence of any statute or constitutional provision upon the same subject, the Committee cannot doubt that all persons and their rights must now be governed by the provisions of our Constitution, and must conform thereto.

But they are also of opinion that no prescriptive right to vote was ever acquired by the inhabitants of these islands; that the exercise of the right originated under colonial ordinances and statutes of Massachusetts, and not otherwise.

The Constitution secures to these inhabitants the right to vote in Bristol only when "assessed to the support of the government by the assessors of that town." It is admitted that they have neither been assesssed nor paid a tax for twenty-one years. But it was urged before the Committee that an arrangement was made between the town authorities and themselves, which should be regarded as *equivalent* to assessment and payment, viz., that they should support their own schools and poor, and the town should not tax them. The answer is simple. The town was under no obligation to support the schools or the poor on the islands, they being no part of Bristol; and the town authorities had no power to tax either their own citizens or even the islanders themselves for any such purpose. The only tax which they could lawfully assess on the islanders, under the Constitution, was a State and

County tax. Hence such an arrangement, if proved, could have no legal validity. Besides, the assessment of a tax on the islanders for the support of government, was a condition precedent to their right to vote, which neither they nor the town authorities could waive. No such power was conferred upon them by the Constitution. The right to vote in Bristol was given for their benefit, but upon condition. They could not claim the right and disregard the condition.

The Committee are therefore of opinion that the inhabitants of Muscongus and Marsh islands, not having been assessed in Bristol for the support of the government, as the Constitution requires, had no right to vote in that town. And they come to this conclusion with the less reluctance, when they reflect that it is a fundamental principle of our government that taxation and representation are inseparable. He who desires to have a voice in the management of the government, should help bear its burdens. To allow the inhabitants of these islands to vote without the payment of any tax whatever, would not only be a plain violation of the provisions of the Constitution, but would operate to exempt them from all the common burdens—a privilege which no other citizens of the State possess.

Their votes must be rejected.

II. Hungry island lies in the north part of Muscongus bay, a short distance from Long island, already mentioned, and about one-third of a mile from the main land. Isaac Reed testified that for thirty years and probably longer, its inhabitants had voted in Waldoborough, but that no tax had been assessed on them since 1855. Waldoborough was incorporated June 29, 1773. The act of incorporation does not include this island, and for the reasons above given, the Committee are of opinion that its inhabitants had no legal right to vote in Waldoborough without being taxed there.

Their votes, four in number, are therefore rejected.

III. The testimony introduced to establish illegal voting in Waldoborough, was very voluminous, and those facts only which the Committee regard as proved, will be stated.

The provisions of the law relating to the preparation of a list of voters, seem to have been disregarded by the officers of the town. By the revised statutes, chapter 4, section 3, it is required that in

towns having more than 3,000 inhabitants, the selectmen shall be in session to receive evidence of the qualifications of persons claiming the right to vote, a reasonable time between the 11th and 18th days of August, annually, and shall give previous notice thereof in the same manner as of town meetings. Waldoborough is a large town, containing more than 4,500 inhabitants. Yet no such notice was given.

By section 4 it is provided that the selectmen on or before August 20th, annually, shall deposit in the office of the town clerk a list of voters, and shall post up a similar list in one or more public places in the town. No notice was posted up in any place except in the town clerk's office, which, last year, was up stairs in the second story of a building, on the back side from the street. This cannot be regarded as, in any sense, such a public place as the statute requires. It was evidently the design of the statute that the list of voters should be posted up in some open and well known place of public resort, such as the post office, town house, meeting house, village tavern, &c. Besides, the statute is clear that it must be posted up in some place other than the town clerk's office. For the latter may be in his own house, or other place inconvenient for public resort. This cannot but be deemed an important provision in a large town like Waldoborough. Yet it was totally disregarded.

By section 5 of the same chapter, it is provided that after the list is thus posted up, the selectmen shall strike no name therefrom without notice to the party, and giving him an opportunity to be heard. Yet the names of two persons, at least, were proved to have been struck from the list, without any notice to the parties, and in violation of this provision of the statute, although both were legal voters. And on the day of election, the selectmen refused to allow one of them to vote because his name was not on the list; and referred to the act of 1861 as forbidding them to enter a name upon the lists on that day.

The whole number of polls taxed in 1863, according to the testimony of Mr. Eugley, one of the assessors, was 886. And there were 91 persons on the list of assessments who paid no poll tax; making 977 persons of all classes taxed in town. And this included minors and females who have taxable property, persons under guardianship, and all others exempted from paying a poll tax. The assessors testified that no poll tax was assessed on soldiers in the army,

but their property was taxed like that of other citizens. That the town had sent upwards of 200 soldiers into the army prior to the September election. But one of the selectmen testified that he had carefully examined their roll, and of the whole number there were but 33 legal voters. By the statute chap. 6, sec. 1, it is required that "a poll tax shall be assessed upon every male inhabitant of this State above the age of 21 years, whether a citizen of the United States or an alien, unless exempted by the provisions of this chapter." The exempted cases are Indians, persons under guardianship, and those who "by reason of age, infirmity and poverty, are in the judgment of the assessors, unable to contribute toward the public charges." It is manifest that the exemptions cannot be numerous. And the principal collector of taxes testified that he knew of but four legal voters in town who were not taxed. It thus appears that the whole number of persons in town liable to taxation, including foreigners, minors, females and persons not paying a poll tax, was 977; and the collector of taxes, who may fairly be supposed to be well acquainted with the people in town, knew of but four legal voters who were not included in the 977. Yet the check list used at the last election, contained 1,199 names; making 222 more males in town above 21 years of age, and qualified to be legal voters, than tax payers of all classes and descriptions. If these men have an actual existence why are they not taxed? The Committee are unable to answer.

Again. Call the whole 977, males and legal voters, add the four not taxed, and the total is 981. Deduct the 33 absent in the army, and the remainder is 948. Yet the returns made to the Secretary of State show 975 votes at the last election; 200 "Union," 775 "Democratic"—apparently 27 more votes than there were voters in town.

Whence this discrepancy? The Committee are unable to answer.

Another fact appeared in the evidence which the Committee think requires notice. The ballot box used was a large, square, open box, without cover of any description. In the rush of a large mass of voters to deposit their ballots in such a box as this, nothing but the good faith of the voters themselves could prevent illegal and fraudulent voting. Indeed, the selectmen themselves, admit that at least eight men voted at the last election without being checked.

The testimony relating to individual cases of alleged illegal vot-

ing was lengthy and cannot be reported except with great labor. Results only can be stated.

Thomas Blackburn—The evidence proved him a foreigner and never naturalized; voté rejected by Committee.

Frederic S. Turner—Same; vote rejected.

William G. Jones—Alleged to be a foreigner; not proved; vote allowed.

Thomas R. Hogue—Same; vote allowed.

Robert L. Dolham—Residence proved to have been in Warren and not Waldoborough; vote rejected.

Theodore Eugley—Residence alleged in Thomaston; not proved; vote allowed.

Wm. H. Wilson—Foreigner, but naturalized, although no register of it in town records as required by law; vote allowed.

John Murphy—Same.

Andrew Borneman—Alleged to be resident of Friendship; not proved; vote allowed.

Webster Tracy—Residence alleged to have been in Lowell; not proved; vote allowed.

Myron M. Hovey—Residence alleged in Boston; a majority of the Committee think the allegation sustained by the proof; vote rejected.

Charles H. Burns—Residence alleged in Thomaston; not proved; vote allowed.

Thomas Herbert—Alleged to have been under age; Committee equally divided in opinion on the proof; vote not rejected.

Edwin S. Head—Alleged to have been under age; not sustained; vote allowed.

George Ripley—Residence alleged in Union; not proved; vote allowed.

Charles Mink—Proved by testimony of Isaac Reed to be a town pauper; vote rejected.

Benjamin B. Robbins—It was proved that this man never had any residence in Waldoborough; that he came to the hotel in that town in the summer of 1863, and worked a few weeks in shipyard, boarding at the hotel a part of the time, and part at a private house; then left and has never been in town since, except on his way through it; that his daughter, about 16 years old, boards in family of Webster Kaler, who is paid by the week for keeping her; vote rejected.

*Gilbert Watson.* This man was a witness before the Committee. He testified that he was born and brought up in Friendship, and owns a small place there and has for several years. Has a wife and children there. Went out in 21st regiment Maine volunteers as a nine month's man. Left his wife and children at home on his place. While he was in New York on his way out, in February, 1863, his wife took the children and some of the furniture, and went to her mother's in Waldoborough, to stay while he was gone. Left rest of the furniture locked up in the house. Did not keep house herself, but lived with her mother. On his return from the army, August 26th last, he found her and the children there and remained with them until the Friday after the September election, when he moved them back to his place in Friendship, where they have ever since lived. That he paid his wife's mother $1.75 per week for boarding them. Had no intention of changing his residence from Friendship to Waldoborough. That his wife received State aid from Friendship while he was in the army and none from Waldoborough. That he went to Friendship the week before the election to get the aid then due, and one of the selectmen asked him if he was coming *home?* He replied yes. The selectman told him not to come until after the election. That he never himself applied to have his name put on the list of voters in Waldoborough, but Charles Mink did, and he voted there. (Charles Mink is the pauper whose vote is above excluded.)

It is not easy to see how the selectmen of Waldoborough could have acted in good faith in this transaction. They must have known, if they knew any thing about the man at all, that he had never before voted in Waldoborough, never paid a tax there, had no property there, never resided there but twenty-three days—that his residence was in Friendship, which was at that moment supporting his family, and that he had no more right to vote in Waldoborough than in Westbrook, where perhaps he never was. And the case of Benjamin Robbins is almost as glaring. The Committee are not unaware that it is often a matter of great difficulty to determine the place of a man's residence and right to vote. But when not a single fact exists by which that right could be acquired or claimed, it is difficult to resist the conclusion that the law has not only been disregarded, but violated.

*George Gross.* The name of this man was proved to have been twice checked. It was also proved to the satisfaction of the Com-

mittee that the check list in connection with his name was altered after the election. By whom done, did not appear. A majority of the Committee are of opinion that there was double voting in this case, and one of the votes is rejected.

*Gilmore Wing's* name was illegally erased from the list, and his vote refused although offered in open meeting. He appears to have been a legal voter. He would have voted for Mr. Stetson, and the vote is allowed.

IV. On the part of Mr. Smith, objection was made to the votes of Boothbay, Southport and Newcastle, on the ground that the polls in the two former were closed before 5 o'clock P. M.; and that a meeting was called and held at 2 o'clock P. M. in the latter, for the transaction of other business. And it was proved that the polls in Southport were closed as early as 3 o'clock P. M. and in Boothbay about 4, clearly contrary to the statute, which requires them to be kept open until 5 P. M. The design of this statute was to prevent one party from massing its forces at an early moment, throwing its votes, and shutting up the polls before its adversaries should arrive. It does not provide that the vote of the town shall be rejected if the polls are not kept open till 5 o'clock, but it is plainly the duty of town officers to conform to its requirements. No suggestion has been made of any unfair practices in fact in either of these towns, and the Committee do not therefore feel bound to reject them. In the case of Boothbay, however, it did appear that one voter arrived after the polls were closed. The illegal act of the selectmen should not deprive him of his vote, and it is accordingly allowed for Mr. Smith for whom he would have cast it.

The proceedings of Newcastle are equally deserving of censure. It was not the intention of the constitution, or of the statute upon the same subject, that the time appointed for receiving the suffrages of electors for Governor, Senators and Representatives, should be interrupted by a meeting called for the transaction of any other business. Most towns hold such meetings before the hour fixed for opening the polls; but in some, a different practice has prevailed. It is to be hoped that it may be discontinued.

A further objection was made to the vote of Southport, upon the alleged ground that the returns of votes were not sealed up in open town meeting. But the evidence relied on, is of a negative

character, and is not regarded as sufficient to control the recitals in the returns, and the other evidence in the case.

It is due to the respective parties to say that the hearing which has been long and laborious, has been conducted with great fairness and ability on both sides; Mr. Baker of Augusta appearing for Mr. Stetson, and Mr. Smith conducting the case *pro se*.

The whole number of votes in the district, according to the following conclusions is . . . . 5,225

Necessary to a choice, . . . 2,613

Everett W. Stetson has . . . . 2,623

Joseph E. Smith has . . . 2,602

And Everett W. Stetson is declared elected.

All which is respectfully submitted.

DAVID D. STEWART,
RUFUS S. STEVENS,
O. N. BRADBURY,
E. H. JEWETT,
S. H. TALBOT,
J. B. WALKER,
S. E. SPRING.

# STATE OF MAINE.

In Senate, February 10, 1864.

Reported by Mr. STEWART, from the Committee on Senatorial Votes, and on motion of Mr. MILLIKEN of Waldo, ordered that 600 copies be printed for the use of the Legislature.

EZRA C. BRETT, *Secretary.*