

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

Elections Marking Ballots
21 APR 1977

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

February 9, 1977

Honorable Harlan Goodwin
House of Representatives
State House
Augusta, Maine

Dear Harlan:

This responds to your request that I review the February 1 Opinion of the Justices decision regarding ballot #8 in light of past precedent. By that decision, the Court indicated that the ballot was a valid ballot cast for Mr. Cunningham with the checkmark to the left but entirely outside the Cunningham square. The Court indicates that under Principle No. 3 of its general discussion of the law, this ballot should be counted.

Principle No. 3 stated:

"As a matter of law, an effective voting choice is not defeated solely because the voters, in using statutorily prescribed marks, has failed to cause any part of such mark to fall within the appropriate square."

The case cited in support thereof, Frothingham v. Woodside, 122 Me. 585 (1923), generally discussed the necessity of ascertaining the apparent intent of the voter in reviewing marks made by the voter. A subsequent decision, Opinion of the Justices, 124 Me. 453, addressed a question regarding marking of ballots with a cross at the right of the name of the candidate but not within the square. At that time squares were to the right of the candidate's name. There the Court held that:

"These ballots raise a doubtful question. They might be counted under the liberal view hereinafter stated in Answer No. 7. In the absence of any evidence of intentional fraud on the part of the voter in so placing the cross as a distinguishing mark." 124 Me. 453 at 490.

Hon. Harlan Goodwin
Page 2
February 9, 1977

Answer No. 7 addressed the question of a ballot being marked in a square opposite a blank space and below a candidate's name. It held that this mark should be counted for the candidate appearing immediately above.

Both Frothingham v. Woodside, supra, and the 1924 Opinion of the Justices, supra, were cited with approval in a 1967 decision relating to marks appearing in squares opposite blank spaces on a ballot. Opinion of the Justices, 227 A.2d 303, 311 (Me., 1967).

Additionally, we would note that in 1974, our office issued an opinion, copy enclosed, relating to marking ballots on the right-hand side where the squares appeared on the left-hand side. Subsequently that opinion was questioned by a letter, also attached, which presents the opposite point of view.

I hope this information is helpful to you.

Very truly yours,

DONALD G. ALEXANDER
Deputy Attorney General

DGA/ec
Enclosures

To Peter M. Damborg, Deputy *JAL* Dept. Secretary of State
From Jon A. Lund, Attorney General Dept. Attorney General
Subject Marking of ballots for candidates in State-wide election

This is a reply to your memorandum of October 29 asking whether the Elections Division of the Secretary of State's Office should allow ballots for candidates seeking election to State-wide offices to be counted if marked on the right-hand side of the ballot at the November 5 General Election. The answer is yes, provided in the judgment of election officials, the mark is not considered to be a distinguishing mark.

The form of the ballot for the General Election is described in 21 M.R.S.A. § 702. With respect to the placement of squares (boxes) on the General Election Ballot, the square must be printed at the left and close to the name of each nominee or write-in space. 21 M.R.S.A. § 702, sub-§ 2, ¶ II. The statutes state "that a voter may designate his choice clearly by a cross or a checkmark" in the square. Ibid. The instructions required to be printed on the General Election Ballot specify that the voter is to make a cross (X) or a checkmark (✓) in the square at the left of the nominee or write-in candidate. 21 M.R.S.A. § 702, sub-§ 2, ¶ C.

Prior to the regular legislative session in 1965, the statutes on the subject of voting required a voter to mark his ballot so that the intersection of the cross or the apex of the checkmark was within the proper square, and if it was not so marked, the ballot was considered defective in law. That provision was repealed in 1965. P.L. 1965, C. 230. In deleting that statutory provision, the Legislature no longer intends that a ballot be considered defective whenever the mark made by the voter is placed in an improper location, provided the intent of the voter is determinable. Presently, a ballot is considered defective only when it contains too many marks or fails to express a definite choice. A ballot is considered void when not prepared in accordance with Title 21 or when it contains a distinguishing mark.

In the event that a voter marks a ballot with either a cross or a checkmark to the right of the name of the nominee or write-in candidate, which mark appears in the space containing the name of the nominee or write-in candidate, the ballot should not necessarily be considered defective for that reason and the vote for that nominee or write-in candidate may be counted, unless in the judgment of the election officials the mark is considered to be a distinguishing mark.

VERRILL DANA PHILBRICK PUTNAM & WILLIAMSON
ATTORNEYS AT LAW

DONALD W. PHILBRICK
COUNSEL

EDWARD F. DANA
DONALD L. PHILBRICK
ROGER A. PUTNAM
ROBERT B. WILLIAMSON, JR.
JOHN A. MITCHELL
LOUIS A. WOOD
LOYALL F. SELWALL
JOHN W. PHILBRICK
JOHN L. SULLIVAN
PETER B. WEBSTER
HOWARD H. DANA, JR.
CHARLES R. OESTREICHER
MICHAEL T. HEALY
CHRISTOPHER J. W. COGGESHALL
CHARLES L. CRAGIN III
SAMUEL C. V. D. KILBOURN
THOMAS J. VAN MEER

ROBERT B. PATTERSON, JR.
BRUCE W. BERGEN
ROBERT A. MOORE
P. BENJAMIN ZUCKERMAN
CHARLES A. HARVEY, JR.

TWO CANAL PLAZA
P. O. BOX 588
PORTLAND, MAINE 04112
207-774-4573

YORK COUNTY OFFICE
DEPOT ROAD
ALFRED, MAINE 04002
207-324-7700

April 5, 1975

The Honorable Joseph Brennan
Attorney General of Maine
Office of the Attorney General
State House
Augusta, Maine 04330

Dear Joe:

As you are aware, I have been involved during the past few months in representing a party in a federal contested election. As part of my duties I have been requested to supply an opinion to the Subcommittee on Elections of the House Administration Committee of the U. S. House of Representatives concerning the validity of certain ballots. One category of ballots is the so-called "right hand vote" whereby the voter placed a check or X on the right hand side of the ballot rather than in the square at the left of the ballot.

As an integral part of my research into the question of the validity of such ballots, I have reviewed an inter-departmental memorandum dated November 5, 1975 from your predecessor Jon A. Lund, Attorney General, to Peter A. Damborg, Deputy Secretary of State, on the subject of "[m]arking of ballots for candidates in State-wide election." That memorandum was apparently in response to a request from the Secretary of State's office as to whether that office should "allow ballots for candidates seeking election to state-wide offices to be counted if marked on the right hand side of the ballot at the November 5 general election." Your predecessor responded in the affirmative with the proviso that such should be the case unless the election official considered it to be a distinguishing mark.

My research of law on the question leads me to the conclusion that the aforementioned opinion is erroneous. Due to the great

weight of authority of your office and the heavy reliance which the people of Maine place upon opinions bearing the imprimatur of your office, I would respectfully request that you review that opinion and advise me as to whether it still remains the opinion of your office.

With your indulgence, I would briefly like to recite the reasons why my research leads me to a conclusion contrary to that of your predecessor. 21 M.R.S.A. §702 sets forth the manner in which the general election ballots of the State of Maine are to be prepared. 21 M.R.S.A. §702(2)(H) provides as follows:

H. Squares Printed. A square must be printed at the left and close to the name of each nominee or write-in space, so that a voter may designate his choice clearly by a cross or a check mark in it.

21 M.R.S.A. §702(2)(C) provides as follows:

C. Further Instructions. The following instructions must be printed in bold type at the top of the ballot: "MAKE A CROSS (X) OR A CHECK MARK (✓) IN THE SQUARE AT THE LEFT OF THE NOMINEE FOR WHOM YOU WISH TO VOTE. FOLLOW DIRECTIONS AS TO THE NUMBER OF NOMINEES TO BE ELECTED TO EACH OFFICE. YOU MAY VOTE FOR A PERSON WHOSE NAME DOES NOT APPEAR ON THE BALLOT BY WRITING IT IN THE PROPER BLANK SPACE AND MARKING A CROSS (X) OR A CHECK MARK (✓) IN THE PROPER SQUARE AT THE LEFT. DO NOT ERASE NAMES. NAMES WRITTEN IN MUST SHOW THE MUNICIPALITY OF RESIDENCE OF EACH WRITE-IN CANDIDATE." (emphasis added).

In your predecessor's opinion he apparently relied on the fact that, in 1965, the legislature repealed 21 M.R.S.A. §925 (2)(C) which had provided that:

If a voter fails to mark his ballot so that the intersection of the cross or the apex of the check mark is within the proper square, the mark is ineffective and his vote for the candidate or question concerned must not be counted.

In reliance upon the repealer, your predecessor stated that the "legislature no longer intends that a ballot be considered defective whenever the mark made by the voter is placed in an improper location, provided the intent of the voter is determinable." There is no legislative history concerning Chapter 230 of the

Hon. Joseph Brennan

April 5, 1975

Page 3

Public Laws of 1965 upon which such an inference of legislative intent can be drawn. As a matter of fact, the only implication that can be drawn is that the legislature did not intend for a vote to be invalidated if the apex of the mark was outside the square so long as a portion of the mark was within the square and the voter's intent could be determined. Such a conclusion is apodictic since the mandatory language of section 702(2)(C) was enacted as section 5 of Chapter 160 of the Public Laws of 1973, a date subsequent to the enactment of Chapter 230 of the Public Laws of 1965.

Opinions of the Maine Supreme Court are clear that the voter must follow the mandatory language of the statute if the vote is to be counted. In Bartlett v. McIntire, 108 Me. 161, 167 (1911) the Court stated that:

In other words the marking must be as the statute commands in a particular place and by a particular emblem. ***The Legislature has the right to prescribe the manner of marking and the voter must follow it if he wishes his vote to be counted. (emphasis added).

In Libby v. English, 110 Me. 449, 454 (1913) the Court stated:

However clearly the voters who marked these ballots may have indicated their intention by other markings on the ballots, they failed to comply with the one essential statutory requirement that ballots must be marked with a cross in the square at the head of the party column. Whatever else he does the voter must express his intention as the statute requires. (emphasis added).

In 1924, the Justices were requested to render certain opinions to the Governor and Council with regard to ballots. It took the occasion to "make a statement as to the law governing the voter's marking of his ballot" and stated:

The Legislature has prescribed what constitutes a legal ballot and in unmistakable terms: "The ballot shall be printed so as to give each voter a clear opportunity to designate his choice for candidates for nominations by marking a cross (X)

Hon. Joseph Brennan
April 5, 1975
Page 4

to the right of the name of each candidate he wishes to vote for as a nominee to each office"...at the top of the ballot shall be printed in capital letters 'make a cross (X) in the square to the right of the person you wish to vote for.'"

It is not a matter of intentions. It is simply compliance or non-compliance by the voter with a mandatory rule established by the Legislature. That body might have provided that a circle or a check mark or an arrow, or any line, or other mark of whatever form or character, in or near the square should be counted, but it did not. Opinion of the Justices, 124 Me. 453, 488-89 (1924) (Emphasis added).

The aforementioned, in my opinion, clearly indicates what the law of Maine has been on the subject since at least 1911. Neither the Legislature nor the voters by initiated bill have made any attempt to change that law.

I am sure that the opinion of your office will be given great weight by the House Sub-committee on Elections in regard to the contested election between Peter N. Kyros and David F. Emery and therefore I respectfully request that you review the opinion and advise me as to whether it still remains the opinion of your office. I would suggest that if, upon review, you concur with my opinion, you should emulate Chief Justice Marshall in Little et al v. Barreme et al, 6 U.S. (2 Cranch) 170, 179 (1804) who said:

But I have been convinced that I was mistaken, and have receded from this first opinion.

Sincerely,

Charles L. Cragin III

CLC/js

cc: Honorable Markam L. Gartley