FORTY-SEVENTH LEGISLATURE.

HOUSE. No. 48.

The undersighed, not concurring in the report of the majority of the Committee on Elections, to whom was referred the petition of Charles Elliot to be admitted to a seat in this House, as representative elect from the district composed of the classed towns of Knox, Brooks, Waldo, Morrill and Belmont, respectfully submit the following

MINORITY REPORT:

According to the return made to the Governor and Council by the Selectmen of the several towns in said district, the vote for representative appeared to stand thus:

Knox—Charles Elliot,		121
	Ebenezer Littlefield,	95
Brooks—Charles Elliot,		34
	Ebenezer Littlefield,	130
Waldo—Charles Elliot,		69
	Ebenezer Littlefield,	46
Morrill—Charles Elliot,		57
	Ebenezer Littlefield,	64
Belmont—Charles Elliot,		91
	Ebenezer Littlefield,	83

the returns upon their face thus giving Ebenezer Littlefield a majority of one vote.

The petitioner, Elliot, claims the seat upon the following grounds:

1st, Because the votes of Hiram P. Sherman and Albert Patch, for Ebenezer Littlefield, in the town of Knox, were illegal, and improperly received and counted.

2d, Because the votes of Thomas Wentworth and Z. Stephenson, legal voters in the town of Waldo, were offered and improp-

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erly rejected by the Selectmen of said town, said votes being for Elliot.

3d, Because the meeting in the town of Brooks was not a legal meeting—only six days' notice of said meeting having been given, instead of seven days as required by the Constitution.

The respondent, Ebenezer Littlefield, in turn assails as illegal the vote of Dennis Ryan, who voted in the town of Waldo, and that of Daniel Herrin, who voted in Knox—both which votes were thrown for Elliot.

Without deeming it necessary to enter into a detailed statement and critical analysis of the oral testimony and written evidence, presented on either side, relating to the votes of Sherman, Patch, Wentworth, Stephenson, Ryan and Herrin, (the voluminous depositions and affidavits relating thereto, and which constitute the greater part of the evidence, being herewith submitted,) the undersigned will simply state the conclusions to which they arrive on these points.

1. The vote of Hiram P. Sherman should have been rejected, he having no legal domicil in the town of Knox.

2. The vote of Albert Patch was legal, and rightfully received.

3. As to Wentworth and Stephenson, although the evidence is somewhat conflicting, the undersigned regard the following facts as proved: Both of the parties were legal voters in Waldo, and intended to vote for Elliot. They appeared at the polls in said town about fifteen minutes after five, according to the Selectmen's time. The chairman of the board remarked that they were just in time. Wentworth offered his vote, but it was rejected upon being presented, the Clerk saying "that he had already made up the vote for Elliot, and did not want to change the figures." Notice was given in the warrant that the polls would be closed at five o'clock, and one of the Selectmen testified that he closed the polls at that hour, but did not say that he made public proclamation of the fact, nor is there any proof that there was any such announcement, or any vote taken thereon. Neither is there any reliable evidence that it was past five o'clock by the *true* time when Wentworth's vote was offered and rejected. The vote of Wentworth should have been received and counted. Stephenson did not offer to vote. His vote should not be counted.

4. The respondent Littlefield assailed the vote of Dennis Ryan, who voted for Elliot in Waldo, upon the ground that he was a pauper. The evidence does not show that he received any supplies as

such within three months prior to the September election. He was clearly a legal voter in Waldo.

5. Littlefield also attacks the vote of Daniel Herrin, who voted for Elliot in the town of Knox. The proof is that he was a legal voter in that town. His vote should therefore be counted.

To sum up at this stage of the case: Adding to Elliot's vote the vote of Wentworth, and deducting from Littlefield's vote the vote of Hiram P. Sherman, the vote would stand thus:

For Charles Elliot, ...	373
For Ebenezer Littlefield, ...	372

Elliot being elected by one majority.

We now reach the main question involved in this case, from the decision of which the most important consequences must flow regarding the fairness and purity of our elections.

The meeting in the town of Brooks was not a legal meeting. It was shown and admitted at the hearing that the warrant notifying the meeting was issued and posted up only *six* days instead of *seven* prior to the meeting.

The Constitution, article 4, section 5, requires in express terms that "the meetings for the choice of representatives shall be warned in due course of law *seven days at least* before the election." And the revised statutes, chapter 4, section 14, repeats the requirement. It provides that "the selectmen of every town, by their warrant, shall cause the inhabitants thereof, qualified according to the Constitution, to be notified and warned *seven days at least* before the second Monday of September annually, to meet at some suitable place designated in said warrant to give in their votes for Governor, Senators and Representatives, as the Constitution requires; and such meetings shall be warned in the manner legally established for warning other town meetings therein."

For good and obvious reasons, it is here provided in the organic law, that there shall be "*at least* seven days notice," that every elector may know when and where the meeting is to be held, and when the meeting is duly called.

If it is here held that this provision of the constitution is a nullity, and that six days notice is sufficient, then there is no limitation of a time that may be regarded as sufficient. A meeting with only five days—or one day—or meeting without any notice or warrant, may under such an interpretation with equal justice be regarded as likewise valid and legal.

A decision sustaining the meeting would be an invitation to such looseness and neglect as would open wide the door to irregularities and fraud, fatal to anything like a fair and full expression of the will of the electors at the ballot-box.

It will be urged that the House in determining the election of its members should give effect to the will of the majority of the electors. It is a proposition which *seems* to be perfectly fair and to admit of no refutation; but a moment's reflection will at once discover its fallacy and its dangerous nature as a governing rule.

It is *not* the will of the electors, but the will of the electors *constitutionally ascertained and expressed* by which we are to be governed.

It is *not* what is said in bar-rooms or at street corners, but what is done at the *legally constituted meetings* held for the purpose, which determine the rights of electors and of candidates for office, and which form the legitimate subjects of investigation on the part of the House in the exercise of its judicial powers regarding the election of its members.

The Constitution is determinate, constant, inflexible, in reference to the powers granted under it. Every provision contained in it, is the result of grave deliberation and studious effort to attain to a delicate and harmonious adjustment, and a perfect balance, of all its parts.

It is not to be regarded as composed of elements independent of, and separable from, each other—any one of which may be safely eliminated, at will, and leave the structure complete as before.

It is not competent for either branch of the government, to whom it has granted only special powers, to declare *any one* of its provisions a nullity.

The supremacy of the constitution and of the laws passed in conformity with it, is to be as fully recognized, and *all* of its provisions, are to be as strictly interpreted, and sacredly maintained by the Legislature, created by the constitution, drawing its very breath of life from, and limited in all its powers and authority by that instrument, as by the Supreme Court in the discharge of its judicial functions.

The position assumed in the Report of the majority of the Committee, divested of all disguise, involves the strange proposition that the House of Representatives existing only *by force* of the fundamental law, may consist of members elected in *direct violation* of one of the express provisions of that law; in other words,

that it has the power, in judging of the elections of its members, to strike out a part of the constitution and substitute its own, for the *legally* expressed will of the people.

The same authority which can annul one provision of the constitution, can annul the whole instrument.

There is but one method by which the constitution can be lawfully changed in any of its parts. It is that which is provided in Section 4, Article X, of that instrument. All other ways of arriving at such results are the paths of the usurper and the revolutionist.

If it is urged that there was no evidence of fraud, nor that all of the electors in Brooks did not vote, and that it is to be presumed that every one had notice of the meeting, and that therefore the town should not be disfranchised through the neglect or wrongful act of the Selectmen, we submit—

First—That the act of the municipal officers is the act of the electors themselves.

Second—The very highest presumption of law, amounting to absolute moral certainty, is, that the framers of the Constitution, in fixing the time of holding the annual September meeting, did not design to supersede or render in the slightest degree nugatory that other provision of the same organic law which in positive and explicit terms prescribes the time and manner of publishing notice of such meeting.

Third—If any argument is to be based upon presumption, it is perfectly legitimate and reasonable to presume that more than one, perhaps many voters in Brooks remained away from the polls on the day of the election because they knew that the meeting had not been legally warned, and because they had a right to assume that all the proceedings of such meeting would thereby be rendered null and void.

The case here presented is not one of mere clerical errors or omissions, or of a defective record of proceedings that in themselves were right. It goes back of all matters of form to substance—to the very existence of the meeting itself as a legally constituted assembly of electors.

In considering this question it is essential to keep steadily in view the broad distinction between those provisions of law which are *mandatory* in their character, constituting *conditions precedent*, and those which are merely *directory* ; between those requirements

which are essential to the very existence of a meeting as a legally organized body, and the provisions which are designed simply to regulate the mode of proceeding, of ascertaining, recording and certifying the will of electors when legally expressed in an assembly legally constituted.

The application of this principle of just criticism in the interpretation of the constitution and laws will always lead us unerringly to right conclusions.

The distinction here laid down as a rule of guidance and the principles here affirmed, have been uniformly recognized by the courts and by legislative assemblies in this and other States, in determining questions of this character.

In the case of Mussey vs. White & al. the Court in an elaborate opinion sustains this distinction with great clearness. Mussey vs. White & al. 3 Maine, 290.

In the Report of the Committee on Contested Elections, in the matter of William I. Farley, remonstrant, against the right of Jonathan Cilley to a seat in the House, (House Document 1833, No. 14,) in deciding one of the vital points in the case, and in which they were sustained by the House, the Committee use the following language, which is so pertinent that we cannot forbear to quote: "In this, as in all cases where power is vested by the Constitution in any officers, the power of these officers should be limited by the *letter of the* Constitution. If we once depart from this rule, we destroy the only barrier between the rights of the people and the exercise of power over them." "But it may be asked, if the electors of a town shall be deprived of these rights by the wrongful act of the Selectmen? We believe they may. The Constitution is not responsible for the acts of officers made by these very electors. It prescribes the modes of effecting an election, by following which all disputes and uncertainty will be avoided. Individuals will have no cause to complain. The right of suffrage will be dear because it is certain. On the other hand, if we disregard the provisions of the Constitution upon this subject, and permit towns to come in for representation upon an *equitable* claim, but through a violation of the authority which gives them *any* claim, the Legislature will be able to do but little more than sit as a tribunal to settle cases of contested elections, and our Constitution will have nothing left but 'a local habitation and a name.'" "It is believed to be better that one town

should suffer for the faults of the officers, than that confusion, dispute, and encouragement to wily, ambitious politicians should be introduced into our representative meetings throughout the State, which we fear would be done by sanctioning this practice. If the rights of electors are not sufficiently protected against the misconduct of Selectmen by the relation in which they stand to the citizens, by the right the electors have of choosing them annually, and by penalties already provided, it remains for the Legislature to provide other means of protection, but, as the Committee claim, not to disregard salutary provisions of the Constitution respecting elections."

In the case of Sanborn vs. inhabitants of Machiasport, where the point decided was whether or not chapter 170, section 1, of Public Laws of 1863, legalized the *doings of towns* at meetings not notified in accordance with the general statute, (only *six* days' notice of the meeting having been given,) the Court held that the meeting was illegal, and that therefore the statute referred to could not make its *doings* valid. Cutting, J., in giving the opinion of the Court uses the following language: "Cities, towns and plantations cannot be said to have any doings, except such as are authorized to be done in ther corporeate capacity. That capacity can only be exercised at a *legal* meeting."—Sanborn vs. Inhabitants of Machiasport, 53 Me. R., 82.

In the case of Lewis & al. app'ts vs. Webb, adm'r, a leading case upon the question of the boundary lines of the different departments of the Government, and in which the principles here in issue were incidentally involved, the Court held that the Legislature had no power under the constitution to pass any resolve *dispensing with any general provision of law*. Chief Justice Mellen, in delivering the opinion of the Court, says: "The object has been to ascertain the will of the people *as expressed in the constitution*, and the true limits of those powers which have been granted to the three departments of government. This will and these limits being ascertained, the path of duty is plain, and it is the interest of all that each branch should pursue it." Lewis & al. app'ts vs. Webb, adm'r, 3 Maine, 326.

In 1863, the Senate, on report of the Committee on Senatorial Votes, rejected the vote of the town of Cutler substantially upon the ground that the record and returns were not made up in open town meeting, and returns sealed up as required by article 3,

section 5, and article 4, sections 3 and 5 of the Constitution, although it was conceded that there was no fraud intended or practiced, that the proceedings were fairly conducted, and that the vote of the town was correctly reported.—Senate Document No. 3, 1863. In the case of the town of Granby, in Massachusetts in 1843—the statute requiring a check-book to be used at elections—it was shown that on the first ballot the check-list was used; that on the second ballot no names were checked, but the Selectmen held the list before them while the balloting was going on, so that they could see that every man voted only once, and could detect any fraud. It was further proved that there was no fraud, and that the member returned was fairly elected by a majority of the votes cast; yet, although the law requiring the use of the check-list was only a statute, and not a Constitutional provision, the vote was rejected, and the town disfranchised.

These decisions go farther than we claim to go. We only affirm that the meeting itself should be legal.

Authorities sustaining the principle of the position we assume might be multiplied to any extent; but we deem it unnecessary further to illustrate this point.

The fundamental idea of Constitutional Government is the protection of minorities. The majority, whether among barbarous or civilized nations, can always protect itself. Every citizen has a common and vital interest in the preservation of the Constitution in all its integrity, since in the midst of the constantly occurring fluctuations of popular sentiment he who is safely sheltered behind a majority to-day, may, in the absence of Constitutional guaranties, be left defenceless with the minority of to-morrow. Let us guard the purity of our elections. Let us hold fast to the Constitution, and not, for the sake of the result in a particular case, strike down the requirements which are absolutely essential to our safety.

The undersigned are clearly of opinion that the vote of Brooks should be rejected.

Finally, upon the law and evidence in the case,—rejecting the vote of the town of Brooks,—the vote stands thus:

For Charles Elliot,	339
For Ebenezer Littlefield,	242

and Charles Elliot is elected to represent the district composed of

the classed towns of Knox, Brooks, Waldo, Morrill and Belmont in this Legislature by a majority of ninety-seven of all the votes legally cast in said district for representative, wherefore the following resolve is respectfully submitted.

HENRY K. BRADBURY,
HALSEY H. MONROE.

STATE OF MAINE.

RESOLVE declaring the election of Charles Elliot.

Resolved, That Charles Elliot, having been duly elected as the representative of the classed towns of Knox, Brooks, Waldo, Morrill and Belmont, is entitled to a seat in this house.

STATE OF MAINE.

In House of Representatives,
February 5, 1868.

Reported from the minority of the Committee on Elections, by Mr. BRADBURY of Hollis, and on motion of Mr. WALKER of Machias, ordered to be printed.

S. J. CHADBOURNE, *Clerk.*