
FORTY-SEVENTH LEGISLATURE.

SENATE.

No. 5.

MAJORITY AND MINORITY REPORTS

OF THE

COMMITTEE ON SENATORIAL VOTES,

OF THE

FIRST SENATORIAL DISTRICT,

YORK COUNTY.

MAJORITY REPORT.

The Committee on Senatorial Votes have had under consideration the returns of votes in the First Senatorial District, comprising the county of York, and the undersigned, a majority of said Committee, ask leave to submit their

REPORT.

Errors were found to exist in the returns from several towns in this district. These errors related either to the name of one of the persons voted for or the number of ballots given in, and have been corrected in accordance with amended returns, supported by affidavits and copies of the original records from the proper officers. And no doubt exists in the minds of the Committee, and no question was made by the parties interested at the hearing before the Committee as to the true state of the vote in any of the towns in said district excepting the towns of York and Kennebunkport. Two questions were made as to the votes of Kennebunkport. The first relates to the whole number of ballots given in, the other that the polls were not closed at the hour prescribed by law, and that votes were received after that time.

1st. The return first sent to the Secretary of State stated the whole number of ballots to have been 1,625. An amended return was presented which stated the whole number of ballots to have been 542. The number of votes for each of the persons voted for are stated alike in the two returns, and are as follows :

Edwin B. Smith,	245
George Goodwin,	246
William M. McArthur,	246
Augustus D. Merrow,	296
James M. Burbank,	298
Nathan Neal,	294

It appeared by the testimony of the Town Clerk, who was before the Committee with his original record, that the whole number of

ballots was declared in town meeting to have been 542, and that the return and record were first written to correspond with that declaration, and afterwards changed to 1,625 upon the suggestion that the true way to ascertain the whole number of ballots was to add together the votes given for the several candidates, and in this way the 1,625 was obtained. The Town Clerk further testified that he soon learned that this was erroneous, and made an amended return and corrected his record to correspond with the number as declared in town meeting. He also testified that he had preserved the ballots, and had them before the Committee, and the number was found to correspond with the amended return.

In view of these facts, your Committee are clearly of opinion that 542 was the true number of ballots given in for Senators in this town.

2d. The record of the meeting for the election was introduced. It disclosed that by unanimous vote of the meeting the polls were closed at half-past five o'clock in the afternoon. There was evidence that some votes, "less than a dozen," were received after five o'clock P. M.

The laws of 1861, chapter 40, provide that "in towns having more than 500 and less than 5,000 inhabitants, the polls shall be kept open until five o'clock in the afternoon, and then be closed."

The town of Kennebunkport falls within the provision of this statute.

There was no evidence by whom, or for whom, the votes received after five o'clock were given, nor is the number by any means certain.

It was proved before the Committee that in the town of York 289 ballots with the names of Augustus D. Merrow, James M. Burbank and Nathan Neal, for Senators, were received, counted and due return thereof made; and that these ballots, beside the names of the persons voted for and the offices to be filled, had also printed on them at the head of the ballot, the words and figures following, viz:

Democratic Nominations. Election Sept. 9, 1867.

Section 22, chapter 4, Revised Statutes, provides "that no ballot shall be received at any election of State or town officers, unless in writing or printing, upon clear white paper, without any distinguishing mark or figure thereon besides the name of the per-

sons voted for and the offices to be filled; but no vote shall be rejected on this account, after it is received into the ballot-box."

We believe the foregoing statement contains all the material facts disclosed in the investigation.

The questions to be determined appear to be these: Shall the 289 ballots with distinguishing marks from the town of York be counted or rejected?

And shall the votes from Kennebunkport be rejected on account of the omission of the presiding officers to close the polls at five o'clock?

Your Committee think the true principle, applicable in this class of cases, is, to give effect to the votes of qualified electors, when the same can be ascertained with certainty, and there has been no fraud, corruption or essential disregard of law.

The right of suffrage and the qualifications of voters are fixed by the Constitution.

The statute does not create a new right, but merely regulates the exercise of a right previously existing. If these regulations have not been complied with, the consequence is the Selectmen have exposed themselves to the penalty.

In other words, your Committee regard the provisions of law involved in this case, as directory, prescribing the manner of voting, and securing obedience by a penalty, but by no means tainting the votes.

No suggestion has been made that any person voted who was not a legal voter.

No difficulty exists in ascertaining the number of votes each person received.

No evidence of any fraudulent purpose on the part of the voters or the officers who presided at the election is discovered. On the contrary the testimony satisfactorily proves that both voters and officers were ignorant of the provisions of law they disregarded. The very section of the statute which prohibits the receiving of votes with distinguishing marks, declares that if received they shall not be rejected.

The construction which your Committee have given to the statute, they believe is in harmony with the rules and decisions of the Court, and the almost uniform practice of the Legislature.

Your Committee, therefore, recommend that the votes of the town of York be counted as returned, and the votes of Kennebunk-

port be counted according to the amended return. In which case, the whole number of ballots for Senators in the First District was

	12,512
Necessary for a choice,	6,257
James M. Burbank has	6,287
Augustus D. Merrow,	6,272
Nathan Neal,	6,256
Edwin B. Smith,	6,088
George Goodwin. . . .	6,225
William M. McArthur,	6,177

Wm. H. Sawyer, 17; Stephen P. Lane, 21; Leonard Andrews, 14; Almon Lord, 9; Jos. Hobson, 5; Samuel Roberts, 4; Wm. B. Nason, Jr., 4; J. Hobson, 3; John O'Brien, 3; W. H. Sawyer, O. G. Bunkum, Jas. W. Burbank, James M. Dearing, Chas. Hill, Joseph Bradbury, John H. Gowen, John Stevens and James McMellen, one vote each.

And James M. Burbank and Augustus D. Merrow, having a majority of all the votes cast, are elected. And no other person having received a majority of all the votes cast, there is one vacancy of Senator in the First District, and George Goodwin and Nathan Neal being the highest numbers of the persons voted for on the lists from said District, are the constitutional candidates for said vacancy.

STEPHEN D. LINDSEY,
PARTMON HOUGHTON,
ISAIAH STETSON,
DAVID DUDLEY,
E. W. FARLEY.

MINORITY REPORT.

The undersigned, being a minority of the Committee on Senatorial Votes, ask leave to present the following

REPORT :

We agree with the majority of the Committee in the correction of returns from several towns, as to an initial letter in the name of one of the candidates, in accordance with the original record, on affidavits from proper officers of the towns ; also in the correction of return from the town of Wells and city of Biddeford, where clerical errors were made by the clerks in the return of the whole number of ballots cast, to correspond with original records.

In the town of York, the following facts appeared in evidence. 289 ballots were received, bearing upon them, in addition to the names of persons, and the offices voted for, the following distinguishing marks in letters and figures, viz :

Democratic Nominations. Election Sept. 9, 1867.

These ballots were clearly in violation of the provisions of the statutes of Maine regarding elections, which provides as follows, Revised Statutes, chapter 4, section 22 :

“No ballot shall be received at any election of State or town officers unless in writing or printing, upon clean white paper, without any distinguishing marks or figures thereon besides the persons to be voted for and the offices to be filled ; but no vote shall be rejected on this account after it is received into the ballot-box.”

It is obvious that the first clause was intended to secure, as far as possible, the most perfect freedom to the citizen consistent with the protection of the purity of the franchise, by presenting the manner in which he should exercise his right of suffrage, so that no improper influence should be exercised upon him by individuals to whom he might be obligated in business matters, or associations for party purposes, that might endeavor, by marked ballots, to ascertain any deviation from their arrangement of concerted action ; or by party

badges and symbols upon such ballots to operate upon the passions and prejudices of the voters. The question, what are distinguishing marks? was raised in 1838, and discussed at considerable length in the case of *Noyes vs. Hayes*, in the House Documents of that year. Ballots ruled in red ink on both sides were rejected by the House as having Distinguishing Marks, while the minority in that case only claimed that the Statute was intended to apply to such marks as might be party badges or symbols. This was as nearly as possible the contemporaneous construction of this Statute provision, and under this construction, admitted on all hands, the 289 ballots cast in the town of York have such distinguishing marks that they must be illegal and subject to rejection. Again, in 1841, a Committee of the House upon this subject, say that the object of the Statute was undoubtedly "to secure and maintain the purity of elections, to guard them against the excitement which might be created by the use of party badges and emblems, and to protect the ballot-box from the espionage of those who might desire to infringe upon the free right of suffrage." (House Documents, 1841.)

The latter clause of the section referred to is clearly binding upon the municipal officers, that they shall not reject marked ballots, if at the final count any are found in the box; but we cannot agree that this violation should be disregarded because parties, through the culpable carelessness, or more criminal connivance, of municipal officers, are able to deposit such ballots at elections.

We are slow to believe that it has ever been the intention of any Legislature to abridge the Constitutional rights of either House to judge of the election and qualification of its members. Provided such intention and the necessary power existed in the Legislature, to enact Statutes binding either House of succeeding Legislatures, the result of elections might frequently depend upon the decision, or even the neglect, of some single municipal officer. If either House may be limited by legislative enactment in the exercise of its Constitutional right guaranteed in article 4, part 3, section 3, of the Constitution in one respect, it may be directed in another, till by continued restrictions the very power itself would completely disappear. In cases of this kind, an eminent jurist has well said, that if this power be lodged in any other body than the House itself, "its independence, its purity, and even its existence and action may be destroyed, or put in imminent danger." (Story on Constitution, 5833.)

Upon the question, whether an election shall be set aside by reason of votes illegally received or rejected, Cushing has the following language :

“An election may be controverted on the ground of the illegal reception or rejection of votes by the returning officers ; and in such a case, if it is proved that votes sufficient to change the majority have been illegally received or illegally rejected, the election will be set aside, and the candidate having the majority will be admitted, but neither the reception of illegal, nor the rejection of legal votes will have this effect unless the majority is thereby affected.”

The following evidence was before the Committee, bearing upon the manner in which these marked ballots were prepared and cast, as showing the motives of the parties, though not affecting the legality of the votes :

Jonah D. Bragdon testifies that he is chairman of the Board of Selectmen of the town of York, that he did not hold the ballot-box that day, but requested another member of the board to do so. After the voting was nearly over his attention was called to the ballots by a conversation between Messrs. Plaisted and Bowden, Plaisted saying that he could “tell them across the room.” He had an impression that there was some law against votes so marked, but the Selectmen, after some consultation, took no action, not being certain about it. He states that Bowden was in the desk during most of the day, and with a paper and pencil made some minutes when certain parties voted. No one challenged the votes. Mr. Marshall requested them to be preserved, after the voting was over. He did not see the heading of the votes during the day, till his attention was called to it by the conversation referred to above.

Mr. S. P. Young, Town Clerk of York, identified the votes as those which were thrown, having preserved them at the request of Mr. Marshall, one of the citizens of York.

Nathaniel B. Marshall testifies that after the polls were closed his attention was called to the heading on the Democratic votes for the first time by a vote which was given him by G. F. Plaisted, and that he at once told Plaisted that was an improper and illegal vote, used to spot his men, and that it was the duty of the Selectmen to throw them out. Plaisted said that he printed them, and that he would risk it. When he saw this heading he ac-

counted for certain signs passing between Bowden and other parties when certain parties voted.

Mr. G. F. Plaisted testifies that he is one of the Democratic Town Committee of the town of York. Printed the Democratic vote of York and Wells. Put no heading upon the Wells votes, and printed and distributed part of the York votes without headings. The heading was merely a matter of taste, and he did not think it a distinguishing mark. He admits the conversation with Bowden referred to by Bragdon, upon a question how some person voted, but claims that it was by the general appearance of the vote that he could tell them across the room, and that the signs to parties in the hall were not in reference to the way which certain parties voted. We are not unmindful that similar action might exist in an excited contest between parties whether or not an intention existed to mark and control the suffrage of any individual. Yet the special attention given to the vote of certain persons by Messrs. Bowden and Plaisted, so obvious as to seem unusual to Mr. Marshall, and to call the attention of the Selectmen to the votes, together with Mr. Plaisted's testimony that he printed and distributed, without headings, part of the ballots of York, on the morning of election, while of the portion of ballots so printed and distributed without headings the singular fact appears that none of these ballots were cast, seems to us to indicate that it could not be entirely the result of accident that these ballots were printed and used.

While we would not deprive any citizen of the benefit of his ballot, we cannot forget that our sympathies should not be allowed to lead us to disregard palpable violations of law and established State policy, lest we be held responsible for such evils as would naturally result from such a course. But shall the electors of a town be deprived of their rights by the wrongful act of Selectmen? Upon this point, as early as the thirteenth Legislature of our State, the House accept the following reasoning:

“ 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 uncertainties will be avoided. Individuals will have no cause to complain. The right of suffrage will be dear because it will be 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 little more than set 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 its officers than that confusion, dispute and encouragement to wily, ambitious politicians should be introduced to our representative meetings throughout the State, which we fear would be done by sanctioning this practice."

In this case of York, the violation of law is the voter's own act, and while severe penalties are provided for municipal officers who wilfully disregard the provision of law, we do not deem it reasonable that no penalty should attach to the citizen who prepares and offers such ballots, nor that justice requires that we should sanction and allow the benefit of the wrongful act to the voter because his ballot escaped the scrutiny of the receiving officers.

Therefore, believing that the purity of the franchise should be most carefully preserved and no precedent established that would seem to countenance a disregard of established policy as well as statute law, even if it be found necessary to exercise a power that may seem somewhat arbitrary in its character for such purposes; we are obliged to dissent from the decision of the majority of the Committee to receive and count 289 marked ballots cast in the town of York.

There are two questions regarding the ballots cast at Kennebunkport. First, as to the actual number of ballots cast. The original returns from that town give 1625 as the true number cast for Senators. This return was afterward amended by a substitution of 542 as the true number, and finally the Town Clerk is before the Committee and under oath sets forth the facts substantially as follows:

I am Town Clerk of Kennebunkport, and acted as such at the election September 9, 1867. I have preserved the ballots; of these votes there were none scattering for Senators. I first put on my record as whole number of ballots, 542. Some one said the return should be made up by addition of the whole number of votes cast for Senators, viz: 1625. The same person said afterward, I led you wrong and I corrected it. I supposed the corrected returns were perfectly correct till last Friday, when Selectmen and myself examined the check list and found 543 names checked. I and Selectmen remember that there was one vote for Representative,

singly, which we cannot find. My record shows 298 for Burbank and it was so declared in town meeting. We cannot account for the two votes thrown for Mr. Burbank unless it was in adding up for the Governor and Senators. I might have said to Mr. Moody that the hearing was over now and say nothing about it.

Mr. Moody testifies that he applied to the Town Clerk of Kennebunkport to examine the books and records of the September elections. In the package he received Mr. Neal's name was cut from two votes, and Mr. Smith's name marked out in one instance. There were no other mutilations, and no names written in place of those cut out. The Town Clerk presented them as the ballots cast at the September election. If Mr. Moody is correct, and the ballots presented the Committee are the same and all of those cast at the September election, the whole number of ballots will be 542, for there being no scattering votes the whole number of ballots must be equal to the sum of the highest numbers cast by each party, for as no man could vote but once, the highest number of votes a candidate could receive would be by having his name appear on each of his party tickets cast. This would give but 296 for Messrs. Merrow, Neal and Burbank, and 246 for Messrs. Smith, Goodwin and McArthur, less erasures in each case—in all, 542 ballots. But the return amended and sworn to *still* says that Mr. Burbank has 298, and so the whole number must be 544, if the Town Clerk and Selectmen are correct.

The Clerk says that himself and the Selectmen cannot account for these two votes, unless by a mistake in addition. The matter appears to us in considerable doubt as to the correctness of either number. If one of the votes was lost, as the Clerk states, when he supposed they were all preserved till a week since, and then the loss was discovered only by comparison with the check list, is it not possible that others may have escaped his notice, and that even the check list may be erroneous? If they admit an error for which they cannot account, how are we to be certain what number to fix upon as the true result? Shall we go further than they, and attempt to correct errors which they confess themselves unable to account for in their returns? We think not, and are therefore of opinion, that the votes of this town are subject to rejection for uncertainty as to the whole number cast. We agree with the majority of the Committee upon the facts that in said town of Kennebunkport the polls were not closed at 5 o'clock

P. M., in accordance with chapter 40, of the Laws of 1861; that the Selectmen were requested to close the polls, but did not do so till half past five o'clock of that day, and that several persons voted during that time. We find it impossible to ascertain how many votes were cast after 5 o'clock P. M. This state of facts existing, another important element of uncertainty as to the number of legal ballots cast in Kennebunkport is added, for if in violation of law municipal officers can prolong a meeting for half an hour, they might for an indefinite period, at their will, thus opening a wide field for abuses in the exercise of the right of suffrage. We have not forgotten the apparent innocence of the electors of this town, and the hardship of disfranchisement; but for the actual impossibility to ascertain the true number of legal ballots cast, we are of opinion that for all the reasons above mentioned these ballots should be rejected.

We have then arrived at the following conclusion, viz :

Whole number of ballots returned,	12,512
Votes of York (bearing distinguishing marks),	289
Votes of Kennebunkport (to be rejected for uncertainty),	542
Total to be rejected,	831
Remaining number of legal ballots,	11,681
Necessary to a choice,	5,841
Augustus D. Merrow has	5,687
James M. Burbank,	5,698
Nathan Neal,	5,673
Edwin B. Smith,	5,843
George Goodwin,	5,979
William M. McArthur,	5,931
Wm. H. Sawyer,	17
Stephen P. Lane,	21
Leonard Andrews,	14
Almon Lord,	9
Joseph Hopson,	5
Samuel Roberts,	4
William H. Nason, Jr.,	4
J. Hobson,	3
John Obrion,	3

and W. H. Sawyer, O. E. Burnham, James W. Burbank, James M. Dearing, Charles Hill, Joseph Bradbury, John H. Gowen, John Stevens and James McMellen one each.

And Edwin B. Smith, George Goodwin and William M. McArthur, having received a majority of all the legal votes cast, are elected.

LUKE BROWN,
JOS. T. WOODWARD.

STATE OF MAINE.

IN SENATE, January 18, 1868.

On motion of Mr. STETSON, laid on the table and ordered to be printed, and Tuesday next, at 11 o'clock, assigned for their further consideration.

THOMAS P. CLEAVES, *Secretary.*