ACTS AND RESOLVES

OF THE

FORTY-SEVENTH LEGISLATURE

OF THE

STATE OF MAINE.

1868.

Published by the Secretary of State, agreeably to Resolves of June 28, 1820, February 26, 1840, and March 16, 1842.

AUGUSTA:
OWEN & NASH, PRINTERS TO THE STATE.
1868.

STATE OF MAINE.

EXECUTIVE DEPARTMENT,
Augusta, December 6, 1867.

To the Honorable the Chief Justice and
Associate Justices of the Supreme Court:

I respectfully ask the opinion of the Court upon the following question—

In counting votes for County officers are the Governor and Council authorized to reject ballots illegally received by the presiding officers of elections by reason of such ballots having upon them distinguishing marks, when such fact is duly set forth in the record of town meeting in which such ballots were cast.

Very respectfully,

J. L. CHAMBERLAIN.

BANGOR, December 10, 1867.

The undersigned, Justices of the Supreme Judicial Court, have the honor to submit the following answer to the interrogatory proposed:

In 1845, the opinion of this Court was requested upon the question whether it was competent for the Governor and Council, in counting votes for county officers, under the provisions of the then existing law, to receive from the town clerk and selectmen evidence to show that the return made by them did not correspond with the records.

The Court in their opinion say that the Governor and Council were no otherwise judges of these elections than "to open and count the votes returned," and that they were not authorized to receive any other evidence in relation to the votes than what the certificates, "prepared in accordance with the law, transmitted and received may contain. They are to compare the votes, and in so doing to ascertain who, if any one, is elected; and if any one is thereupon found to be elected, it will become the duty of the Secretary of State to issue notice to him of his election; and if no one shall be ascertained to be elected, the Governor, with

the advice of the Council, must make an appointment to fill the vacancy.

"The powers conferred upon the Governor and Council are specific and precise, and it is believed it would be irregular to go beyond them, or in any manner to deviate from them. If they could receive evidence that the certificates were erroneous in one particular, they might, with equal propriety, do so in another; and so exercise the powers of judges of those elections generally, and without restriction."—25 Maine 568. The same views were reaffirmed in Baron *vs.* York County Commissioners, 26 Maine 494.

The Legislature, the opinion of this Court as to the power of the Governor and Council in cases like the present having been ascertained, saw fit to enlarge those powers only to a limited extent. By R. S. 1857, chap. 78, sect. 5, "The Governor and Council, on or before the first day of December in each year, shall open and compare the votes so returned, and may receive testimony on oath to prove that the return from any town does not agree with the record of the vote of such town *in the number of votes, or the names of the persons voted for,* and to prove which of them is correct, and the return when found to be erroneous may be corrected by the record."

The power of the Governor and Council in relation to the matter under consideration was increased in two respects only—the number of votes and the names of the persons voted for. In no other respect was their authority enlarged. The correction of errors is limited by the section above cited. The language of the statute is clear and precise. Its meaning is obvious. Had the Legislature intended to have conferred more extensive authority on the Governor and Council they would have indicated such intention.

By R. S. 1857, chap. 4, sect. 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 name of the person voted for, and the office to be filled; but no vote shall be rejected on this account, after it is received in the ballot box."

We do not understand from the question proposed that the fact that certain votes had "distinguishing marks or figures thereon" appeared on the return made to the Governor and Council, but the reverse. By the previous decisions of this Court it has been held they were not authorized to correct any errors in the returns before them by resorting to extrinsic evidence. The Legislature have by sect. 5, indicated the precise extent to which errors may be corrected—affirming practically the opinion of the Court in every other respect. The fact that certain votes had distinguishing marks or figures, was not one as to which the Governor and Council were by statute empowered to correct the returns in the Secre-

tary's office, by having recourse to the records of towns. They are to "open and compare them," and upon comparison, subject to certain specified and defined corrections, to determine who are to be declared elected. And that is the limit of authority conferred upon them.

We therefore answer the question proposed in the negative.

JOHN APPLETON.
EDWARD KENT.
C. W. WALTON.
J. G. DICKERSON.
WILLIAM G. BARROWS.
CHARLES DANFORTH.
RUFUS P. TAPLEY.

Hon. J. L. Chamberlain, Governor of Maine, Augusta.

The answer to the question propounded by the Governor depends upon the construction of sect. 22 of chap. 4 of the R. S. of 1857, which is in these words:

"No ballot shall be received at any election of State or town officers unless in writing or printed upon clean white paper without any distinguishing mark or figures thereon, besides the name of the person voted for, and the office to be filled, but no vote shall be rejected on this account, after it is received into the ballot box."

The Constitution Art. 2, sect. 1 provides that "Every male citizen of twenty-one years and upwards, excepting," &c. "having his residence established in this State for the term of three months next preceding any election, shall be an elector for Governor, Senators and Representatives in the town or plantation where his residence is so established," &c.

But the mode and manner in which this election franchise, so sacred to every citizen, is to be exercised, must necessarily be provided for by legislative enactments, of which the section cited is such, and must be construed in case of doubt, so as not to encroach upon so sacred a privilege. With this view, the section before cited, was enacted, making the presiding officers of the town the judges of what constituted a ballot with distinguishing marks under a severe penalty in case of an intentional and erroneous decision. The section authorized them to decide what constituted a distinguishing mark. There may have been many marks upon the ballot which may or may not have been distinguishing; the voter may have presented it in good faith and as such it may have been received by the town officers, which on subsequent

inspection may be determined otherwise, and so certified. But the same was received without objection; whereas had objection been made before the vote was cast, another vote could easily have been substituted, and most assuredly would have been, if the voter had been apprised of its illegality by the presiding officers. But if such a vote be cast without objection by the officers having jurisdiction over the subject matter, no power is conferred by the statute on the Governor and Council to say that such vote shall be rejected. Consequently I answer the question in the negative.

JONAS CUTTING.

Hon. Joshua L. Chamberlain.