

HOUSE.....

.....No. 7.

R E P O R T

ON

ELECTION RETURNS,

AND

PENALTIES RESPECTING THE SAME.

Commonwealth of Massachusetts.

HOUSE OF REPRESENTATIVES, Jan. 25, 1839.

The Committee on the Judiciary to whom was referred so much of the Address of the Governor as relates to the *Election laws*, and who, by an order of the 16th inst., were instructed to consider the expediency of imposing a penalty upon municipal or other officers for failing to make returns of votes, in legal form, and in due season—have considered the subject and submit the following

REPORT:

The irregularity adverted to in the Address of the Governor arises from the neglect of the officers presiding at elections to state in their returns the whole number of ballots given in, as required by the 13th Section of the 4th Chapter of the Revised Statutes, or in stating the ballots incorrectly. That section very plainly requires the presiding officers, first to count all the separate ballots or pieces of paper with the name of a person voted for, on it, (exclusive of blanks,) and in all cases to state the whole number in the return of the election. This and this alone, will shew the number of voters who have deposited ballots in the election. The direction of the law is im-

perative, that, although a number of persons are to be voted for, as usually in the case of Senators, each ballot is to be counted as one, though but one name is borne upon it, as fully as if it contained as many names as the whole number to be voted for. Each equally represents one voter. And a candidate to be elected must have, in his favor, the ballots of a majority of the voters actually casting legal ballots. It is not a compliance with the law, to add up the total of all the names borne upon all the ballots, and divide the aggregate by the number of persons to be voted for, in order to ascertain by the result whether a candidate is elected; unless, (which is rarely the case,) every ballot cast in the election contains as many names as are to be voted for. This process would often show that a candidate was elected, without proving that he had in his favor the ballots of a majority of the persons who voted: and it would, not unfrequently show an apparent election of more persons than were to be voted for in the election.

The Committee regret to learn that, in practice, this plain and salutary provision of the statute referred to, has not, in all cases, been complied with, but that in some instances there has been an entire neglect to state and return the number of ballots, and that in others, the aggregate number of all the votes, or of all the names borne upon all the ballots is returned in its stead. For any wilful neglect in this respect, the officer is, by the provisions of the 11th section of the same chapter, liable to a penalty of two hundred dollars.

The Committee are not aware, that any legislation could make this subject more intelligible than it now is. They believe the errors and omissions in this respect are growing less every year, as the subject is more generally

understood, and they hope, as the Executive has very properly directed the public attention to the evil, that it will in future be fully remedied by the increased attention of the various presiding officers to the subject. This desirable object would probably be advanced if the 11th and 13th sections of the 4th chapter of the Revised Statutes were printed upon the blank forms for returns of the elections sent to the several towns by the Secretary of State.

Should the returns, however, hereafter be imperfect or insufficient, it will be for a future Legislature to provide a remedy. And it will be worthy of consideration, whether the penalty now provided for *wilfully* neglecting or refusing to perform the duties thus enjoined by law, should not be extended to all cases excepting those which result from unavoidable accident.

As a means of *correcting the erroneous returns* when made, the Governor suggests a provision requiring “the town clerk to seal up in open town meeting and preserve the original ballots,”—and that whenever a case of a deficient or erroneous return is presented to that branch of the government which is the ultimate judge of the election, “a precept might issue to the town clerk, requiring him, in the presence of the selectmen, to open and again count the original ballots, and make a corrected return of the election.”

If this duty were performed properly and in good faith it would probably give the means of correcting error. But it would, in many cases, produce great delay. And it is worthy of consideration, whether the increase of the duties to be performed, in the confusion attendant upon the close of an election, by officers, often inexperienced, would not increase the chances of mistakes or negligence.

Besides, the Constitution requires the ballots to be counted, the result declared, and a record thereof made, and in case of the election of Governor, and Lieutenant Governor, the return to be made and sealed up, *in presence of the inhabitants in open town meeting*. These provisions were doubtless made to secure a right to a vigilant supervision of the proceedings by the voters themselves, and to give them an opportunity to inspect the whole process. If the ballots were to be afterwards again counted by *the town clerk and selectmen alone*, and a new return made, varying from the former one, and controlling and setting it aside, the safeguards thus intended to be placed around this important process by the Constitution, will be dispensed with by the mere act of an ever varying legislation. It may be said that this objection might be obviated, by requiring that a new meeting should be called for the purpose, and the ballots there re-examined, and a new return made in open meeting. But this would be attended with greatly increased delay, and any variation in the return from the former one would subject the returning officers to severe animadversion, and a doubt would still remain whether a return thus made, would come strictly within the requirements of the Constitution.

It may be proper also to advert to the practice not uncommon in many towns, in counting the votes, to cut up or divide the imperfect ballots, or those not having upon them the full number of names to be voted for, in order to facilitate the counting, thus effectually preventing any subsequent examination of the ballots as given in. And although this might be forbidden by law, it would be but adding one more provision to the present requirements, and increasing the chances of error or neglect, and it might require some years' practice, effectually to enforce it.

The order of the House as to the expediency of imposing penalties upon municipal and other officers having charge of election *returns* is very broad, embracing in its terms, the returns of elections of all State, United States, and all county officers elected by the people, as well as certain militia officers, but was probably designed to apply particularly to returns to be made to the office of the Secretary of State.

In some few instances, the existing laws have prescribed penalties for *wilful* neglect or refusal to perform prescribed duties in this respect,—as in cases before mentioned under the 4th chapter of the Revised Statutes—and the cases of Representatives to Congress, and Electors of President and Vice President under the 6th chapter. By the 6th chapter the Sheriff may also be subjected to a severe penalty for *any* neglect to return the votes as therein required of him.

But in most cases of violations of duties required of officers in relation to elections and their returns, no specific penalty is by law provided. And the Legislature have seemed to rely upon the character of the officer, and the animadversions of public opinion, as sufficient correctives in this respect.

By a reference to the Journal of the Committee on the Revised Statutes, it will be seen, that this subject was not overlooked by them, or by the learned Commissioners appointed to revise the laws. A proposition was there made that when any duty was enjoined by law upon any person holding any public trust or employment, every *wilful* neglect to perform such duty, where no special penalty was provided, should be punishable as a misdemeanor. And, on the deliberate advice of the Commissioners, the Committee declined to adopt it.

Should the present, or any future Legislature think proper to increase this class of penalties, it would seem equitable to make a distinction between those officers, who voluntarily assume offices for the emoluments attached to them, and those who are, by law, compelled to serve when elected. And in prescribing or graduating such penalties, it will be expedient so to do it, as not to deter the most deserving and efficient from accepting office.

In view of the whole subject, the Committee do not recommend any *present* legislation thereon.

Per order,

GEO. BLISS, *Chairman,*