

[Document G.]

BY THE HOUSE OF DELEGATES,
January 26th, 1866.

Read and ordered to be printed.

MAJORITY REPORT

IN

THE CONTESTED ELECTION CASE

OF

GEORGE E. GAMBRILL, ESQ.,

VS.

SPRIGG HARWOOD, ESQ.

ANNAPOLIS:

HAVERSTICK & LONGNECKERS, PRINTERS.

1866.

REPORT.

To the Honorable,
the House of Delegates of Maryland:

The committee on Elections, to whom were referred the memorial of George E. Gambrill, contesting the right of Sprigg Harwood to hold the office of Clerk of the Circuit Court for Anne Arundel county, and the counter memorial of Sprigg Harwood, insisting upon his right to retain the said office, respectfully report:

That they have carefully examined the law and the facts as fully presented before them by the respective parties and their counsel, and the majority of the committee have arrived at the conclusion that the House should adopt the accompanying resolutions admitting the contestant to the said office.

The first ground upon which Mr. Gambrill claims the office is that Mr. Harwood, in the year 1865, was a Senator representing Anne Arundel county in the General Assembly; that during the January session of 1865, sundry laws were passed increasing the salary or profits of the said office; that the election was had during the period of time for which he was elected Senator, and that consequently he was ineligible to the said office at the time of the said election, according to the provisions of section 16 of Article 3 of the Constitution.

That section reads thus:—“*No Senator or Delegate, after qualifying as such, notwithstanding he may thereafter resign, shall during the whole period of time for which he was elected, be eligible to any office which shall have been created, or the salary or profits of which shall have been increased during such term, or shall, during said whole period of time, be appointed to any civil office by the Executive or General Assembly.*”

A similar provision, but much less stringent in its language, is to be found in the Constitution of 1850, and also in the Constitution of the United States, and of almost every State. This should be a sufficient vindication of its propriety, to satisfy any mind of its wisdom. Every commentator upon this point has testified to its value and the necessity of its enforcement.

But even if these opinions should not meet with our approval—as they do—the language of the Constitution is too imperative to be disregarded by any one who values the oath he has taken to observe its requirements.

It is admitted that Mr. Harwood was a Senator in 1865; that he qualified as such; that the election in November, 1865, to fill a vacancy in the office of clerk of the Circuit Court was had “during the period of time for which he was elected” Senator, and that at election he received a plurality of votes for the office; that Gambrill received the next highest number, and that he was a qualified candidate; and the disputed points under the section are, first, whether the salary or profits of the office of clerk of the Circuit Court for Anne Arundel county were increased during the term for which Mr. Harwood was elected Senator; and, second, whether, if this be so, an increase of the salary or profits of the office of clerk of that county was within the meaning of the section under consideration.

As to the first point, the undersigned can have no doubt. There are numbers of Acts which were passed during January session, 1865, most of them by the aid of Mr. Harwood’s vote as Senator, the inevitable result of which was to increase the salary or profits of that office. Among those referred to are the following:—Chap. 130, directing the registration of births, marriages, &c.; chap. 174, entitled, an Act for the registration of voters, &c.; chap. 181, known as the oyster law; chap. 190, amending the Code relating to mechanics’ liens.

In the opinion of the undersigned, the direct effect of these laws is to increase the profits of the clerk’s office. The degree of the increase is unimportant; the ineligibility is as complete where the increase is small as where it is large. But in fact, the proper execution of the laws enumerated above must enhance the profits of the office in no inconsiderable degree. It is in evidence before the committee, that up to a day named, two hundred licenses to oystermen had already been issued by the clerk of Anne Arundel county, the direct fees for which amount to one hundred dollars; while the commissions on the cost of the licenses amount to fifty dollars.

It was argued before the committee that a great many laws passed by the General Assembly might incidentally increase the fees of the clerk, and that the only laws comprehended by the section of the Constitution above referred to were such as had for *their object* the increase of the profits. But the undersigned cannot assent to this view of the subject.

Such a construction would render the section perfectly ineffectual, for any member of the Legislature who desired to

have the profits of an office increased for his own prospective benefit, could readily enough effect his object by indirection. The object of chapter 130, already referred to, was to provide for the registration of births, &c., but the compensation of the Secretary of the Senate is quite as effectually increased by section 11 of the law, which very properly allows him a sum of money for discharging certain important duties under it, as if such increase of pay had been the sole purpose of the act. The intention of the constitution was to take away from every member of the General Assembly, one temptation of voting from improper motives, by declaring that whenever any increase of the profits of any office had been made during his term of service he should not enjoy the fruits of that increase by being eligible thereto during the whole period of time embraced in his Legislative term, and the mischief is not prevented if the effect of such an increase is to be neutralized by the production of other acts passed during the term by which the profits of the office may have been diminished in some respects, for such a conclusion would be licensing the evil. It might appear to the House of Delegates, that a member had worked and voted for the increase with the most selfish motives, and worked and voted against the supposed decrease, and yet such a member would be eligible according to this argument, in the face of the positive words of the constitution.

The debates by the convention of 1864, show the meaning which that body intended to attach to the section, and that they designed to render a Senator or Delegate ineligible to any office, the compensation of which may have been *modified* while he was such Senator or Delegate. Vol. 2, Debates, page 808.

But even if there were any force in this view, there was another act passed at that session to which this objection could not apply.

It is within the recollection of every member of the House that strenuous efforts were made at the last session by many Clerks and Registers and Judges of the Orphans' court to procure an increase of their compensation. In reference to any increase in many of these officers, the provisions of the constitution seemed to offer an inseparable objection. The subject was thoroughly examined and discussed, and the opinion of the Attorney General requested by the Legislature and given by that officer upon the point. The result was that the General Assembly determined to increase the compensation of the Clerks of courts whose emoluments did not reach the constitutional limits of \$2,500. And chapter 157 was passed with the avowed object and design of increasing the profits of those offices. That act re-enacted section 9 of article 18 of the Code as established by the act of 1862, chap-

ter 255, by adding thereto these words: "and every such Clerk, the emoluments of whose office shall not amount to the sum of \$2,500, in any one year as aforesaid, may present a statement to the County Commissioners of his county, or to the Mayor and City Council of Baltimore, as the case may be under oath, showing the nett proceeds of his office, together with a statement of the cost of the necessary Record Books, Stationery, and fuel used in his office up to the first Monday of June in each year, and the said County Commissioners or the Mayor and City Council of Baltimore, are hereby authorized and empowered to pay or levy for the use of said Clerk the amount of said Books, Stationery and fuel as aforesaid, provided that the amount so paid and levied shall not when added to the said nett proceeds of his office exceed the sum of \$2,500."

The certificates from the Comptroller show that since 1857 the only emolument returns made by the clerk of the Anne Arundel Circuit Court, represent the gross proceeds of the office as much below the constitutional limit, and such is understood to be the admitted fact up to this time. By section 44, Article 3, the compensation to clerks and registers was limited to twenty-five hundred dollars over and above office expenses, and compensation to assistants, and such compensation to clerks, registers, assistants, and office expenses, were required to be paid out of the fees or receipts of the offices respectively.

Assuming, therefore, that in 1864 the gross receipts of the office of clerk of Anne Arundel county were two thousand dollars, (which is more than the highest return by the clerk,) and the pay to assistant clerks five hundred dollars, and office expenses, three hundred dollars. The nett proceeds of the office were twelve hundred dollars, and this was the extent of his compensation. But since the passage of the Act of 1865, chapter 157, the clerk is allowed to receive from the County Commissioners of the county a sum equal to the amount of said books, stationery, and fuel as aforesaid.

It can require no argument to prove that this Act directly increased the profits of the office of clerk of Anne Arundel, and of all other counties where the nett receipts did not exceed twenty-five hundred dollars. Such was the undoubted purpose of the law, which was strenuously advocated by the clerks of the smaller counties, upon the ground that the increased cost of living absolutely required such an increase, if they were to retain their offices. Those officers who left the seat of government after the passage of the law, elated in their success, and who have already received the benefit of the increase, would be greatly surprised to be told that the profits of their offices have not been increased by the passage

of the law. The committee can hardly believe that such an argument would be gravely urged anywhere. And the second section of the same Act worked a material increase in the profits of these offices, which was urgently solicited by the clerks at the time, by requiring all fees for recording deeds to be paid in advance.

But the effect of these laws, and especially of the last, is attempted to be impaired by the proposition that section 16, of Article 3 of the Constitution, does not apply to the case of the clerk of Anne Arundel county, because the enhanced profits cannot exceed twenty-five hundred dollars, the limit of compensation fixed by the Constitution.

The result of this argument would be, that if it were proved to the House that a member of the General Assembly from one of the smaller counties, with the avowed purpose of offering himself as a candidate for the clerkship of his county, at an election to be held before the expiration of the period for which he was elected, should introduce and procure the passage of laws directly or indirectly swelling its profits from one thousand dollars to twenty-five hundred dollars, he would be eligible to the office, notwithstanding these matters were proved to the House: in other words, that a member is at liberty to use his efforts to increase the profits of a small office, with a view to his own emoluments, but not of a large office.

The undersigned can see no reason for such a distinction, nor do they perceive any force in the arguments. It is not contended that the laws thus increasing the profits of the Clerk's office are not constitutional and proper, or that the clerks are not entitled to receive the additional profits up to twenty-five hundred dollars; we only insist that, although any other person elected to those offices may rightfully receive this compensation, no person who was a member of the General Assembly when the increase was made can be eligible to them during the whole period for which he was entitled to serve as such member. The constitutional limitation of the salaries of clerks has nothing to do with the matter. Were the salaries or profits increased during the term of the members? is the only question. If there was any such increase, the member is not eligible to the office during his whole term, whether the increase were much or little. The section operates an inhibition upon him from being elected to such office during his term, as positively as it prohibits a Member of Congress from being a member of the General Assembly, or a member of the Legislature from receiving a civil office from the Governor or General Assembly during his term as member of the Legislature.

Article 12, section 1, limits to three thousand dollars the

compensation of all officers whose pay is not elsewhere limited. Suppose the the fees of the sheriffs had been increased at January session, 1865, would Mr. Harwood be eligible as sheriff of Anne Arundel county during his term of office? Undoubtedly not, if the words of the Constitution are to be understood in their obvious sense; and yet Article 12, section 1, limits the compensation of the sheriffs quite as effectually as section 44 of Article 3, limits the compensation of the clerks. Any other qualified person, not a member of the General Assembly in 1865. would be eligible as such sheriff, notwithstanding the fees may have been trebled, and he could retain the compensation up to three thousand dollars, but no one who was a member of that body at the time such a law might have passed, could be eligible until after the end of the whole period of time for which he was elected.

In view of these considerations, the undersigned have no difficulty in deciding that Mr. Harwood was not eligible as clerk of the Circuit Court of Anne Arundel county in November, 1865, and therefore that he was not elected.

The next question is, was Mr. Gambrill legally elected as clerk at that election?

In our opinion, Mr. Gambrill was legally elected at the election, and is entitled to the office.

In Cushing, on Legislative Assemblies, page 66, the law is thus stated: "If an election is made of a person who is ineligible, that is, incapable of being elected, the election of such person is absolutely void, even though he is voted for at the same time with others who are eligible and who are accordingly elected; and this is equally true whether the disability is known to the electors or not; whether a majority of all the votes or a plurality only is necessary to the election; and whether the votes are given orally or by ballot." The author proceeds to quote instances to support his assertion, in this country and in England, and states that if the electors have notice of the disqualification every vote given for him afterwards will be thrown away, and considered as not having been given at all, and the candidate having the next highest number of votes will be elected. "This doctrine, however hard it may seem, is founded on the familiar principle that every man is bound to know the law with reference to any act which he undertakes to do." And in section 179, he says: "In reference to elections by ballot, where secrecy is the distinguishing feature, and in which consequently neither the returning officers nor the electors themselves are supposed to know for whom the votes are given until the result is declared, it seems not unreasonable to consider the votes for ineligible candidates to be thrown away in all cases, and the opposing candidate elected, *where the electors know or*

must be presumed to know the disability, and in all cases where there is no such actual or presumed knowledge to hold the whole proceedings merely void."

In this State the decisions have gone to the full extent of these authorities. In the case of Mr. Holton contesting the seat of Mr. Maclin, at the last Session, the Senate unseated Maclin and admitted Holton, upon the ground that the voters must be presumed to have known of Maclin's ineligibility, on the ground of disloyalty; although many persons testified that Maclin, from the beginning of the rebellion, had expressed sentiments of a character directly opposed to those charged against him; but the committee found from the whole evidence, that Mr. Holton's charges were proved, and they held that the voters must be presumed to have known of their truth.

In the present case the ineligibility of Mr. Harwood must be presumed to have been known by every voter; no man is allowed to proclaim himself ignorant of the law. Every one knew Mr. Harwood was Senator, and every one knew or must be presumed to know, that a Senator was ineligible under the constitution, to an office, the profits of which had been increased during his term of service; and no one if he were really ignorant, can be allowed to plead ignorance of the public laws of the State, which had increased the profits of the office of clerk. In fact, for the first time the laws of 1865 were extensively published; the papers were full of notices of the efforts of the clerks to have their incomes increased. No men of intelligence in the county were ignorant of what every Member of the General Assembly well knew, that the effect of the Legislation of 1865 was to increase the value of this particular office to a considerable extent; there was certainly enough known by every one to put him on inquiry; and if, despite of this knowledge, the voter preferred to run the risk of losing his vote for the sake of voting for his favorite candidate, in the language of the authority already quoted, "he took upon himself the risk of losing his vote, if his construction of the law should turn out to be wrong;" Cushing, section 177. And we think in a case like this, it would be highly inexpedient to submit this matter to another election. The result of the election of an ineligible person is, that he enjoys the office until the Legislature meets, then, if he is declared out of office, he may again offer himself and hold until the Legislature may again assemble, receiving the emoluments until again unseated, and perhaps again offer himself as a candidate, with the same thing to go over again.

We are of the opinion that this House, which is the absolute judge of the election and qualification of the contestants of this office, should pass the following resolutions:

Resolved, That Sprigg Harwood was not duly elected Clerk of the Circuit court of Anne Arundel county, at the election held in November, 1865, he having been ineligible to said office under section sixteen of article three of the Constitution of Maryland.

Resolved, That George E. Gambrill, having received the highest number of legal votes cast for any duly qualified candidate for Clerk of the Circuit court of Anne Arundel county, at the election held in November, 1865, is declared to have been duly elected to that office, and entitled to the possession of the same.

JAS. F. LEE,
WM. H. HOFFMAN,
UPTON BUHRMAN,
W. S. WOODEN,
JAMES VALLIANT.