

## Chapter CLXVIII.

### GENERAL ELECTION CASES 1914 TO 1917.

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1. Cases in the Sixty-third Congress. Sections 138,139.
  2. Cases in the Sixty-fourth Congress. Sections 140,143.
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**138. The Missouri election case of Gill v. Dyer in the Sixty-third Congress.**

**Under the practice of the House ample time is allowed for filing minority views in contested election cases.**

**Discussion as to the evidence required to prove a conspiracy to commit election frauds.**

**Upon proof of a conspiracy to defraud, the returns from the part of the district involved were rejected.**

On May 7, 1914,<sup>1</sup> Mr. Henry M. Goldfogle, of New York, from the Committee on Elections No. 3, submitted the report in the Missouri case of Michael J. Gill v. L. C. Dyer.

Mr. John C. McKenzie, of Illinois, asked eight days in which to file minority views. Mr. Frank Buchanan, of Illinois, suggested that four days were sufficient.

Thereupon Mr. James R. Mann, of Illinois, the minority leader, said:

It has always been the custom of the House that the minority be given a reasonable time in election cases in which to file their views after the majority report has been presented to the House. Sometimes they have had two or three weeks. This is a very limited time proposed in comparison with the precedents heretofore.

Mr. Oscar W. Underwood, of Alabama, the majority leader, further stated:

In the case where the right of a Member to a seat in this House was involved it has always been customary to allow the minority a reasonable time in which to present its views, and, with the pressure of other business, I do not see where it is going to be possible for the gentleman from Illinois [Mr. McKenzie] to get that report ready before 10 days, and I can not see any reason why the gentleman's request should not be granted, that this side of the House may have a full opportunity to present their views properly.

Mr. McKenzie's request as submitted was then agreed to.

This case involved charges of conspiracy between judges and clerks of election, and disregard of statutes specifying procedure to be followed by election officials in marking ballots for voters. The charges relate to one ward only and no question is raised to any other part of the district.

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<sup>1</sup>Second session Sixty-third Congress, House Report No. 629, Record, p. 8231.

In this ward the original returns gave Dyer 2,213 votes and Gill 815 votes. A recount of the vote in this ward, ordered pursuant to the laws of Missouri on application of the contestant, gave Dyer 2,009 votes and Gill 994.

There was no charge against either the contestee or his party. Both the minority and majority reports hold him innocent of any responsibility for the irregularities charged. In fact the charges involve the conduct of judges and clerks of the contestant's party only.

The majority report explains this unusual situation:

Some of the judges and clerks of election entertained what might well be called a political factional antagonism against Gill for what they conceived he had done as a voter in the election of 1910. In that election Thomas Kinney was the Democratic candidate and Mr. Dyer the Republican candidate for Congress in the twelfth district of Missouri. Dyer was declared elected, and took his seat. Kinney contested the election. Subsequently and in 1912 Gill was nominated as the Democratic candidate for Congress, receiving Kinney's support at the primaries. While this Kinney-Dyer contest was in progress a recount of the ballots was had.

An examination of Gill's ballot revealed the fact that he had scratched Kinney and voted for Dyer. Thomas Kinney died before the disclosure was made, and Michael E. Kinney, his brother, succeeded him in the Democratic leadership of the ward. Gill was called before the congressional committee of the ward to make an explanation of his scratched ballot. He stated that there must have been some mistake. That explanation was not accepted, and Kinney and his brother-in-law, Thomas Egan, Democratic committeeman for the fifth ward, thereupon made known to their followers that they were strongly opposed to Gill's election, and desired his defeat. In fact, contestant's counsel contends in his brief, and argued to the committee that the election officials "were involved" in the conspiracy "to please Egan." This unquestionably was so. Egan and Kinney both bitterly and vigorously opposed Gill, giving instructions to their followers to scratch Gill on the Democratic ticket. A reading of their testimony leaves no doubt in the minds of the committee that what was so perniciously done by the election officials was done in their belief that they were serving Kinney and Egan in their expressed desire to compass Gill's defeat.

In the ward in question there were 51 Democratic judges and clerks and 51 Republican judges and clerks, a total of 102 election officials. The recount disclosed the fact that 87 of these officials had voted for Dyer. After reviewing the vote and other evidence produced before the committee, the majority report concludes:

The evidence establishes the fact that a conspiracy was formed and existed between the judges and clerks of election in many of the precincts of the fifth ward to deprive Gill of votes cast for him and if possible to count him out. The Missouri law with reference to the votes of illiterate persons and persons physically disabled requires such persons, if they desire to have their ballots marked by a judge of election, to make oath as to their illiteracy or physical disability, in which case the ballots of such voters may be marked as they direct by a judge of election in the presence of the other judge. The evidence in the case demonstrates that this law was in many instances utterly disregarded by the judges of election. In some cases voters whose names were signed on the registry list and therefore could not be said to be illiterate, had their ballots openly marked by judges of election, although no oath was administered to them, and the evidence fails to disclose any physical disability on their part. In some cases ballots of unsworn voters were scratched by judges of election, sometimes by direction of the voter, sometimes without any direction by them, and sometimes by the suggestion of the election judge, and the ballots then put in the box.

The committee does not hold that a disregard of the provision requiring oaths to be administered to illiterate or disabled persons necessarily invalidates the election of the sitting member or justifies the rejection of the poll or the casting out of the vote of the person whose ballot was thus irregularly received. Upon that question we are not required now to pass. But a persistent violation of the statutory provisions, coupled with other acts of misconduct, as gathered from the

testimony, including unlawful marking of ballots, tampering with the votes cast for the contestant and making returns so glaringly false that their falsity could only have been the result of willful design, constitute circumstances so strong as to weigh potentially in favor of the contestant's contention that election officers in precincts where such misconduct and illegality occurred, resorted to a concerted and devised scheme to prevent by the means adopted by them the election of the contestant.

As to proof of such conspiracies, the majority say:

Conspiracies and fraud are frequently not susceptible of direct or positive proof. They usually are connived at and concocted in secret. They may be established by evidence of facts and surrounding circumstances, which properly linked together agreeably to rules of law exclude the presumption of innocent conduct and point logically and convincingly to the fact, and satisfy both the mind and conscience that the conspiracy was formed or the fraud was committed.

In conformity with this finding the majority recommended the rejection of the several polls affected, citing in support of their position from the case of *Washburn v. Voorhees* (2 Bartlett Cont. Cases, p. 58):

When the result in any precinct has been shown to be so tainted with fraud that the truth can not be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction but call for the rejection of the entire poll when stamped with the characteristics here shown.

**139. The case of Gill v. Dyer, continued.**

**Instance of refusal of sitting Member's request for leave to submit evidence.**

**While disregard for statutory revisions does not necessarily justify rejection of the poll, a persistent violation of law coupled with corroborative evidence constitutes circumstances warranting presumption of fraud and rejection of the vote.**

**The contestant in an election case is entitled to be heard by the House in his own behalf.**

**An affirmative vote on the first part of a resolution declaring the sitting member not elected, followed by a negative vote on the second part declaring the contestant elected, leaves the seat vacant.**

An incidental question arose over the application of the contestee, presented after a tentative vote had been taken by the committee, asking leave to submit further testimony. The application was denied, the committee basing its denial on the opinion reported under similar circumstances in the case of *Gidding v. Clark* in the Forty-second Congress.

The committee further say:

The voluminous testimony in the case, comprising 2,205 pages of closely printed matter and a multitude of exhibits, was given careful reading, searching attention, and painstaking consideration. In view of the fact that no charge of misconduct or impropriety attaches to Mr. Dyer personally, that he was not a participant in the conspiracies, irregularities, or frauds which gave rise to this contest and has served as an honorable Member of this House, the discharge of the serious and important duty of this committee was rendered the more difficult; but the deplorable situation of affairs created by the fraudulent and illegal acts of election officers, constituting a grievous assault on the integrity of the ballot box, is such that the committee finds itself constrained, upon the facts established and the law as it applies thereto, to set aside the returns of the seven precincts mentioned, namely, the second, third, fourth, fifth, ninth, fourteenth, and seventeenth.

Eliminating these precincts, the vote in the fifth ward would stand as follows:

For Dyer .....	1,185
For Gill .....	586
	599
Dyer over Gill in the fifth ward .....	599
Gill's plurality in district outside of fifth ward .....	666
	67
Deducting Dyer's plurality in the fifth ward with the 7 precincts eliminated leaves Gill a plurality of.	

The committee recommends the adoption of the following resolutions:

*Resolved*, That L. C. Dyer was not elected a Representative in the Sixty-third Congress from the twelfth district of the State of Missouri, and is not entitled to a seat therein.

*Resolved*, That Michael J. Gill was duly elected a Representative in the Sixty-third Congress of the United States as a Representative from the twelfth district of the State of Missouri, and is entitled to a seat therein.

From this recommendation the minority views presented by Mr. McKenzie dissent both as to the facts and the law. The minority find no evidence of fraud or conspiracy and insist:

The vote as returned should be corrected in so far as the evidence shows any possible errors, but that in the face of this mass of testimony corroborating the returns it would be unconscionable to throw out seven precincts, from which some 2 per cent of the voters have been examined as to their ballots, and about 1 per cent have impeached the official returns. To do so is certainly a new rule in congressional election contests.

As to the law:

The majority lay some stress upon the fact that voters were assisted by judges in the preparation of their ballots, without having been sworn to alleged illiteracy or disability. And, though the majority admits that a disregard of the provision of the Missouri statute requiring such oaths does not necessarily invalidate the election or justify casting out the vote of the person so assisted, they argue that a persistent violation of this statute constitutes a circumstance of suspicion. This statute, however, has been construed years before by the Supreme Court of Missouri, the highest court in that State, to be only directory, and that it can be disregarded without affecting the validity of the votes received. It was so held in the case of *Hope v. Flentge* (140 Mo., 390).

In conclusion the minority recommend the following resolution:

*Resolved*, That the Committee on Elections No. 3, or a subcommittee thereof, be instructed to take additional testimony in the contested-election case of Michael J. Gill *v.* Hon. L. C. Dyer, touching the election of November fifth, nineteen hundred and twelve, in precincts two, three, four, five, nine, fourteen, and seventeen, of the fifth ward of the city of St. Louis, with particular reference as to whether or not the Democratic ballots in those precincts, which had Michael J. Gill's name scratched, were the correct votes of the voters in question, or whether some person or persons had fraudulently scratched the name of the said Gill without the knowledge and consent of the said voters; and that the said committee, after it has taken and considered this additional evidence, in connection with testimony heretofore taken, make its report to the House, with its recommendations, within thirty days after the adoption of this resolution.

The report was debated on June 18 and 19.<sup>1</sup> On the latter date the contestant submitted through Mr. Goldfogle a request to be heard in his own behalf.

<sup>1</sup>Record, p. 10732.

A question as to whether there was objection to the request being raised, the Speaker<sup>1</sup> said:

It does not make any difference whether anybody makes any objection, the gentleman has a right to make a speech.

The question being on agreeing to the substitute offered by the minority, Mr. Mann submitted as a parliamentary inquiry—

The majority resolution consists of two parts. If the substitute offered by the minority should not be agreed to and a separate vote should be had on the two parts of the majority resolution, and that part unseating Mr. Dyer should prevail and that part seating Mr. Gill should not prevail, would the result be that the seat would be left vacant?

The Speaker held the seat would be left vacant.

The question being taken,<sup>2</sup> was decided in the negative, yeas 107, nays 136. A division of the majority resolution having been demanded, the first proposition unseating the sitting Member was agreed to, yeas 147, nays 98, and the second proposition seating the contestant, yeas 125, nays 108.

Thereupon Mr. Gill appeared and took the oath.

#### **140. The Connecticut election case of Donovan v. Hill in the Sixty-fourth Congress.**

**Instance wherein the committee without submitting formal report authorized submission to the House of resolutions deciding an election case.**

On January 24, 1916,<sup>3</sup> the Clerk of the House transmitted to the Speaker a list of contests for seats in the House of Representatives for the Sixty-fourth Congress, including the case of Jeremiah Donovan *v.* Ebenezer J. Hill from the fourth district of the State of Connecticut.

In his notice of contest the contestant charged the sitting Member with violation of the corrupt-practices act of the State of Connecticut.

The case was referred to the Committee on Elections No. 1.

On February 20, 1917,<sup>4</sup> Mr. Hubert D. Stephens, of Mississippi, from the committee, submitted as privileged the following resolution:

*Resolved*, That Jeremiah Donovan was not elected a Member of the Sixty-fourth Congress from the fourth congressional district of Connecticut and is not entitled to a seat therein.

*Resolved*, That Ebenezer J. Hill was elected a Member of the Sixty-fourth Congress from the fourth congressional district of Connecticut and is entitled to a seat therein.

The resolutions were unanimously agreed to by the House without debate.

#### **141. The Massachusetts election case of Horgan v. Tinkham in the Sixty-fourth Congress.**

**Instance wherein a contested election case was decided without formal report from the committee.**

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<sup>1</sup> Champ Clark, of Missouri, Speaker.

<sup>2</sup> Journal, p. 674; Record, p. 10757; Moores' Digest, p. 84.

<sup>3</sup> First session Sixty-fourth Congress, Record, p. 1480.

<sup>4</sup> Second session Sixty-fourth Congress, Journal, p. 256; Record, p. 3698; Moores' Digest, p. 94.

On January 24, 1916,<sup>5</sup> the Speaker laid before the House a communication from the Clerk of the House transmitting a list of contests for seats in the House of Representatives for the Sixty-fourth Congress. Among the cases so listed was that of Francis J. Horgan *v.* George Holden Tinkham. from the eleventh district of the State of Massachusetts.

Subsequently on the same day the Speaker referred the case to the Committee on Elections No. 2.

No written report was submitted in the case, but on August 7, 1916,<sup>1</sup> the following proceedings were had in the House:

Mr. James A. Hamill, of New Jersey. Mr. Speaker, I offer the following privileged resolution from the Committee on Elections No. 2, which I send to the desk and ask to have read.

The Clerk read as follows:

“House resolution 340.

“*Resolved*, That GEORGE HOLDEN TINKHAM was duly elected a Member of the Sixty-fourth Congress as a Representative from the eleventh congressional district of Massachusetts and is entitled to the seat therein.”

The SPEAKER. The question is on agreeing to the resolution.

The resolution was agreed to.

#### **142. The South Carolina election case of Prioleau *v.* Whaley in the Sixty-fourth Congress.**

**A petition unsworn to and not offered as an exhibit to a deposition should not be included in the record of an election case.**

**In the absence of proof to the contrary, the presumption of law is that election officials have complied with the law, and persons refused the privilege of registering or voting were disqualified under the law.**

**The House declined to invalidate an election because a State constitution had established qualifications of voters in disregard of reconstruction legislation.**

**The validity of an election is not affected by the failure of a majority of the qualified electors to exercise their right of suffrage.**

On July 21, 1916,<sup>2</sup> Mr. Hubert D. Stephens, of Mississippi, from the Committee on Elections No. 1, submitted the report in the South Carolina case of Aaxon P. Prioleau *v.* Richard S. Whaley.

In this election the sitting Member received 2,989 votes and the contestant received 56.

The contestant in his brief charges that election officials arbitrarily prevented the registration and voting of over 27,000 legal voters because they were American citizens of African descent.

On this point the committee decide:

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<sup>1</sup> Journal, p. 923; Record, p. 12247. The case is not reported in Moores' Digest.

<sup>2</sup> First session Sixty-fourth Congress; House Report No. 1034; Journal, p. 890; Record, 11400; Moores' Digest, p. 92.

<sup>5</sup> First session Sixty-fourth Congress; Journal, p. 250; Record, p. 1480.

An analysis of this testimony shows that there is nothing to prove that there was "any arbitrary action on the part of the officials" that prevented anyone either from registering or voting.

Witnesses for contestant testified that negroes paid taxes, but that many of them are not allowed to register or vote, and that this is true of many who can read and write, and who own more than \$300 worth of property. This is the gist of all the testimony taken by contestant.

The constitution of South Carolina states that every male citizen of the State and the United States shall be an elector, who is not laboring under the disabilities named in the constitution, and who possesses the qualifications required by it.

The qualifications referred to are residence in the State for two years, in the county one year, in the precinct four months, and the payment of a poll tax six months before the election; and the ability to read and write any section of the constitution, or proof of payment of taxes on property in the State assessed at \$300 or more.

Persons convicted of certain offenses are disqualified for registering or voting.

It does not appear from the record that any person was refused the right to register and vote who was qualified to do so. Payment of taxes, ability to read and write, and ownership of property in the sum of \$300 or over are not the only qualifications of an elector.

If it be true that many persons were not allowed to register and vote, there is nothing to show that they possessed all the necessary qualifications.

There is no proof in the record that any "harsh, unreasonable, and unlawful means, rules, regulations, and methods were used that discriminated against the rights and privileges" of a single person, either in the matter of registration or voting.

It may be true that, as stated in the record, many negroes were prohibited from registering and voting, and that the registrars were white men, but in the absence of any proof the presumption of law is that these officers followed the law rather than that they violated it, and that the persons refused the privilege of registering and voting were disqualified under the law.

Incidentally, touching a petition signed by 431 persons and reaffirming statements contained in the notice of contest, the report declares:

This petition really has no place in this record. It is not sworn to, is not an exhibit to any deposition, and was not offered in evidence by contestant.

A further contention that the election laws and constitution of South Carolina are in conflict with the reconstruction act of June 25, 1868 (15 Stat. L., 73) is briefly disposed of by the committee:

The second specification, which relates to the act of Congress which was enacted June 25, 1868, and the fourteenth and fifteenth amendments to the Constitution of the United States, is not a new question. It has been presented to the House in several contested-election cases that have come from the State of South Carolina.

This contestant has been the contestant in six or seven contested-election cases. In the Sixtieth Congress, in the case of Aaron P. Prioleau *v.* Geo. S. Legare, this contestant raised the identical point involved in the case now pending before us. The minority leader, Mr. Mann, was then chairman of this committee. In the report made by Mr. Mann the point was decided adversely to contestant, and that report quoted the reports made in three other contested-election cases from South Carolina. In each case this same question was involved.

We do not deem it necessary to argue the question or to present decisions of the court on this point, but simply call attention to the four cases referred to above where the House has taken action in cases involving the same point, and we are willing to follow the precedent set by the House.

On the contention advanced by the contestant that a majority of the electors of the district failed to vote at the election, the committee say:

The third point made in the brief is that "neither the contestee nor the contestant was elected." It was argued that there are about 60,000 voters in the congressional district, and that because only about 3,000 votes were cast no valid election was held.

There is no merit in the contention that the election was invalid simply because a very small per cent of the electors voted in this election.

McCrary on Elections, section 167, says:

"If an election is held according to law, and a fair opportunity is afforded for all legal voters to participate, those who do not vote are bound by the result. It has been held that if the majority expressly dissent and do not vote the election of the minority is good."

The same authority, section 462, says:

"Where the statute provides in general terms that the election shall be determined by the majority of the electors, it will be held to mean the majority of the electors voting; and in ascertaining the result under such a statute, no inquiry as to the whole number of persons entitled to vote will be necessary or proper."

In conclusion the committee recommend the usual resolutions declaring the contestant was not elected and the returned Member was elected and entitled to the seat.

The resolutions were agreed to without debate or division.

#### **143. The New York election case of Brown v. Hicks in the Sixty-fourth Congress.**

**The presumption that election officers properly discharged their full duty must obtain until refuted by competent and convincing evidence.**

**Petition for an inspection of ballots must be supported by evidence indicating error in the official, return and such request based merely on the hope of discovering error will not be entertained.**

**The authority of the House to judge the elections and qualifications of its Members is infinite and in no way circumscribed by State statutes or the decisions of State courts.**

**While the House has often signified willingness to recognize constructions placed upon State laws by State tribunals, the decisions of State courts are not necessarily binding upon the House and will be accepted only when commending themselves to favorable consideration.**

**The power of the House to examine ballots and correct returns is inherent but should be exercised only after the official returns have been discredited.**

On January 22, 1917,<sup>1</sup> Mr. Lewis L. Morgan, of Louisiana, from the Committee on Elections No. 3, submitted the report in the New York case of Lathrop Brown v. Frederick C. Hicks.

The official return in this case had given Mr. Hicks, the sitting Member, a plurality of 15 votes. Questions relating to the conduct of the election and the counting of the ballots were submitted to the Supreme Court of the State of New

<sup>1</sup>Second session Sixty-fourth Congress; House report No. 1326; Journal, p. 146; Record, p. 1756; Moores' Digest, P. 93.

York which handed down an opinion reducing the plurality from 15 votes to 4 votes. (168 App. Div., 370; 170 App. Div., 358.) On appeal the Court of Appeals of the State of New York again revised the returns giving the sitting Member a plurality of 10 votes (216 N. Y., 732; 110 N. E., 776).

The paramount question presented in this case was whether the ballots should be inspected. The contestant alleged numerous errors on the part of the inspectors of election and contended that the committee ought to view the ballots.

There was a sharp division of opinion in the committee on this point.

In order to do full justice to the attitude of the various members of the committee on this subject it may not be amiss to state in this connection that several members were of opinion that the failure of the election inspectors, in many instances, to comply with the mandatory provisions of the State law, requiring all disputed ballots to be segregated for judicial review and the consequent inability of the court to administer complete relief in this case, together with the known errors in the official count developed in the court proceedings dealing with only a portion of the ballots in question, justified and even required a recount of all the disputed ballots in this case. And thereupon a motion was submitted by these gentlemen that said disputed ballots should be sent for and inspected. This motion, however, failed on a poll of the committee, and as there was no satisfactory evidence, outside of what a review of the ballots might or might not have disclosed, upon which contestee's title could successfully be questioned, the committee as a whole acquiesced in and do hereby submit to the views of the majority as herein expressed.

It was therefore agreed:

This contest is predicated largely upon the hypothesis that the inspectors of election, in their effort to differentiate between void and valid ballots, committed many errors. Upon this supposition the contestant urged that the committee ought to view the ballots.

Now, the presumption that the sworn officers of the law did their full duty must obtain until the contrary is made to clearly appear by competent and convincing evidence, and we submit that proof sufficient to overcome this presumption does not, in our judgment, appear in the record. To view the ballots merely in the hope of discovering that the differences of opinion, which naturally arise between honest inspectors of election, caused enough errors to change the result would be in contravention of a cardinal rule of law.

On this question the New York Court of Appeals, in its adjudication of the case as presented to the court, had negatived the right of the House of Representatives under the circumstances to inspect the ballots. But the committee maintained:

It was argued that inasmuch as the New York court of final resort held that the ballots could not be recounted, for the reason that they had not been marked and segregated in accordance with the requirements of the statute of that State, that this committee is estopped and precluded from arrogating to itself the right to view such ballots. We do not think that there is much force in that contention.

Your committee maintains that the authority of the House of Representatives to judge of the elections and qualifications of its members is infinite. Since the formation of the Government the House has often signified its willingness to abide by the construction given by a State court, in good faith, to its statutes. But the decisions of a State court are not necessarily conclusive on the House, and will only guide and control it when such decisions commend themselves to its favorable consideration.

The power to examine ballots and to correct both deliberate and inadvertent mistakes and errors, shall always remain in the House. But this power should be exercised only after the official returns have been discredited.

The report concludes with a recommendation for the adoption of the following resolutions:

*Resolved*, That Lathrop Brown was not elected a Representative to the Sixty-fourth Congress from the first congressional district of New York.

*Resolved*, That Frederick C. Hicks was elected a Representative to the Sixty-fourth Congress from the first congressional district of New York, and he is entitled to retain his seat therein.

The House without debate or division agreed to the resolutions recommended by the committee.