HIGH COURT OF AUSTRALIA

Kean

Vs.

Kerby

(Isaacs J.)

2 June 1920

Isaacs J

This is a petition under sec. 183 of the *Commonwealth Electoral Act 1918-1919*, by John Kean, disputing the validity of the return of Edwin Thomas John Kerby as a lawfully elected member of the House of Representatives, at the election which took place on 13th December 1919, and, alternatively, disputing the validity of the election itself. The formal requirements of secs. 185 and 186 were proved to have been complied with.

The material facts of the case itself are as follows:—On 13th December 1919 a general election took place for the House of Representatives. For the Electoral Division of Ballarat there were two candidates—the respondent, Edwin Thomas John Kerby, and David Charles McGrath. The final official number of votes allotted to the candidates were, Kerby, 13,569, and McGrath, 13,568, the former being returned as member on a majority of one vote. The petitioner, an elector of Ballarat, thereupon lodged the present petition, claiming a declaration that McGrath was duly elected, or, alternatively, that the election is absolutely void. The respondent, Kerby, maintains his right to the seat. Various grounds, with particulars, are alleged by the petitioner; and there are countercharges, with particulars, by the respondent. During the trial both sides, without objection, amended their particulars, and the case is dealt with on the allegations as amended.

The hearing took place partly in Melbourne and partly in Ballarat. It has raised several extremely important points of election law, and has revealed a great number of official errors causing disfranchisement of electors. In some cases these errors were due to almost incredible carelessness on the part of local Presiding Officers. I propose to consider first the Ballarat evidence, in which term I include the evidence of the two witnesses who, for convenience, were examined in Melbourne. The Ballarat evidence relates to four different classes of votes, viz., Postal voting, Voting under sec. 121, Ordinary voting, Absentee voting. I deal with them in that order. I think it desirable, both for the parties and for future guidance, that, except in practically obvious instances, my reasons, both of fact and law, should be publicly stated.

1.

Postal Voting.—The respondent claims to have added to his total votes, a postal vote in the name of "J. Connell." A postal vote certificate was issued to John Connell on 3rd December 1919 on an application duly made by him the previous day. The envelope bearing the certificate was posted to and received by the Divisional Returning Officer, and is assumed to contain a vote. The envelope is still unopened, and it is unknown for whom the vote is cast or whether in point of form it is validly

cast. The Divisional Returning Officer was not satisfied, even on the recount, that the signature on the certificate, purporting to be that of the elector, was that of the elector who signed the application, and therefore disallowed the ballot-paper without opening the envelope. I am asked to say that the two signatures are by the same person, that the ballot-paper should be inspected, and the vote counted. I assume the respondent believes it would be for him. The evidence for identity consists of, first, a declaration by the elector made on 31st December 1919, on the recount by the Divisional Returning Officer after the original rejection of the ballot-paper, and, next, the oral testimony of Dr. Sandison of the Ballarat Hospital. On the other hand, there is evidence against identity. It consists, first, of the *ex facie* dissimilarity in handwriting between the signature "J. Connell" on the certificate, and the signatures "John Connell" on the application and on the declaration itself, the two latter corresponding closely with each other. Next, the elector himself, in giving evidence, recollected very well the occasions of signing the application on 2nd December 1919 and the declaration of 31st December, but had no recollection of signing the certificate on 12th December. Further, on his personal inspection of the signature on the certificate, he did not think it was his, both from the conformation of the "C" and from the fact that the initial "J." was used instead of the full Christian name "John." He wrote his name in Court, and the signature so written resembles that on the application and the declaration, and is different, as they are, from the signature on the certificate. Again, the Divisional Returning Officer, who has had great experience in handwriting, was asked for his present opinion, after the oral testimony of Dr. Sandison. He still adhered to his view of non-identity. I have to remember that the onus of proof is on the respondent, and I am greatly impressed with the great difference in handwriting between the signature "J. Connell" on the certificate and the signature "John Connell" on the other three documents. As I have stated, one of those documents was prior and the others were subsequent to the crucial signature. I am also impressed with the circumstance that the confident expressions contained in the elector's declaration of 31st December are markedly at variance with his oral evidence before me. Two persons were present when that declaration was made, and neither of them was called. I have no testimony as to who drew up that declaration, or on whose or what instructions, or how far the elector appeared to understand what he then declared to. On the whole, the onus of proof has not been sustained; I am not satisfied any more than was the Divisional Returning Officer that the elector signed the postal certificate envelope, and I disallow the ballot-paper.

2.

Voting under Sec. 121.—Two votes that were admitted for McGrath were, one by John Miller and the other by Mabel May Arnold, under sec. 121. It is claimed for the respondent that these two votes should be disallowed on the ground that the voters had removed, the one to Gippsland and the other to Balaclava. Their names had been removed from the Ballarat rolls for 1919, but the evidence on which the Divisional Returning Officer acted is all one way, that an official error occurred and that neither of these electors had lost the right to vote for Ballarat. I agree with the Returning Officer as to the effect of that evidence. The votes were properly allowed, and must remain. The votes of Connell, Miller and Arnold are the only votes in the Ballarat evidence that could possibly have been counted, and, as I leave them as the Returning Officer dealt with them, it follows that the Ballarat evidence does not alter the actual number of votes to either side. The other cases arising in the Ballarat evidence under sec. 121 are of a different description. They consist of persons who are alleged by the petitioner to have been entitled to vote under that section and to have been wrongly refused a vote, and it is claimed by the petitioner that these and other votes refused vitiated the election.

Before entering upon the facts of those cases, it is desirable to consider what the law is as to the

right of a person to vote for a Subdivision where his name does not appear on the subdivisional roll. Sec. 39 provides, in sub-sec. 3, that "All persons whose names are on the roll for any Electoral Division shall, subject to this Act, be entitled to vote ... at elections of Members of the House of Representatives for the Division." Sec. 121 (1) provides that "Notwithstanding anything contained in this Act, when any person who is entitled to be enrolled on the roll for a Subdivision claims to vote at an election at a polling place prescribed for that Subdivision, and his name has been omitted from or struck out of the certified list of voters for that polling place owing to an error of an officer or a mistake of fact, he may, subject to the Act and the regulations, be permitted to vote if—(a) in the case of a person whose name has been omitted from the certified list—(i.) he sent or delivered to the Registrar for the Subdivision a duly completed claim for enrolment or transfer of enrolment, as the case requires, in respect of the Subdivision, and the claim was received by the Registrar before the issue of the writ for the election; and (ii.) he did not after sending or delivering the claim and before the issue of the writ become qualified for transfer of enrolment to another Subdivision," and makes a declaration "in the prescribed form before the Presiding Officer at the polling place." A form of declaration has been prescribed in Form 31 to the *Electoral and Referendum Regulations 1918*. The meaning of the requirement of "a duly completed claim for enrolment or transfer of enrolment" was contested. On the part of the respondent it was urged that that meant, in relation to sec. 121, a claim made, since the reprinting of a roll from which an elector's name was omitted, to have the name enrolled thereon. As applied to the present case, that contention meant a claim with special reference to the 1919 roll to have the names of the specified voters included in it. On the other side the contention was that, once a valid claim for enrolment or transfer of enrolment was made, that stood under sec. 121 until by change of residence to another Subdivision the elector became qualified for transfer to the other Subdivision. The official practice, as proved by Mr. Anderson, the Divisional Returning Officer, has been consistently in favour of the latter contention. It treats the roll as a constant record of enrolment: it requires one application for enrolment or transfer of enrolment, and, once that is done, the voter is regarded as entitled to be on the roll until the right is lost, and reprints do not destroy the right, though erroneous omissions or striking out need compliance with sec. 121 in order to enable the elector to vote. I am clearly of opinion the official practice is right. There are two strong reasons for this conclusion. One is that the language of the Act read as a whole, and in favour of the franchise, as all such Acts should be read (see the *City of Londonderry Case*[1]), is more consistent with that view than with the opposite view. The other reason is that the other view not merely imposes on every elector the practically impossible and certainly arduous duty of eternally watching electoral rolls as they are reprinted, in order to guard against official errors at peril of being disfranchised, but also, by sec. 42, imposes on him a penalty if by chance he omits to observe the error.

It follows from what I have said that once a valid claim for enrolment was made, at any time before the issue of the writ for the election, that would enure to inclusion in the 1919 reprint of the roll unless between the claim and the issue of the writ the elector became qualified for transfer to another Subdivision. I now take up the actual instances relied on.

One was that of Theodore Charles Quarrell. He was enrolled on the roll as printed in 1917, and properly so. He was struck off because, having removed from Peel Street to Wills Street, it was supposed he had left the Subdivision of Ballarat East. That was an erroneous supposition, both streets being within the Subdivision. He received no notification of objection, and was clearly entitled to vote in 1919. He asked for an ordinary ballot-paper, and he knew of no other way of voting. He offered to make an affidavit of residence, but was, by official error, refused a ballot-paper, and did not vote. Another instance was that of Mercedes Quigley. She was in the 1917 copy of the roll for Ainley Street, Ballarat East. She removed to Finley Street, still within the

Subdivision. I find as a fact that she did all that was necessary to entitle her to receive a ballot-paper, and that by official error she was not supplied with one. Similarly I find that her husband, John Quigley, was refused a ballot-paper. He actually went so far as to clip out from a newspaper a copy of sec. 121, and hand it to the Presiding Officer, who, for some unexplained reason, did not read it. The evidence makes very evident to me the great desirability in cases arising under sec. 121 that Presiding Officers should inform the intending voters that a declaration is necessary, and not trust to the voter knowing this requirement of the law. The voter may not be aware of it, and may consequently omit to comply with it, thus losing the vote.

3.

Ordinary Voting.—Mrs. Christina Merrett resides at 125 Grant Street, Ballarat West. She applied at the local polling booth for a ballot-paper, and was told she was not on the roll, and got no ballot-paper, and could not vote. On the 1919 roll her name appears plainly enough, thus:—"3738 Merrett, Christina, 125 Grant Street, Ballarat, home duties. F." Mrs. Merrett was obviously a reliable witness, and, as the only evidence to the contrary was non-recollection of one officer, I accept her version. In her case, I hold that a vote was wrongly refused.

4.

Absentee Voting.—Mabel Franklin resides at Mount Mercer in the Buninyong Subdivision of Ballarat. She went to Redan, which is outside the Subdivision, to vote. She said to the Presiding Officer: "I am in the Buninyong Subdivision, and I am voting for Mount Mercer." She asked for an absentee vote. The Presiding Officer looked up a printed list of polling places, and finding one called "Mount Mercer," in Corio, gave her a Corio ballot-paper, telling her she was in Corio. That was an error. There are two Mount Mercers. One is within the Buninyong Subdivision, and was not a polling place; and the other is in Corio, and was a polling place. The Presiding Officer, with the best intentions, erroneously overlooked the fact that Mrs. Franklin said she was in the Buninyong Subdivision, and he chose the wrong Mount Mercer. Clearly she, accepting the assurance of the Presiding Officer, was deprived of her vote by official error. Alfred Reason, on the roll for Ballarat East, and Alfred Crowther, on the roll for Buninyong, went to Duverney polling booth outside the electorate to vote as absentees. They were told there were no blank absentee ballot-papers left. The Presiding Officer was asked to alter some ballot-papers he had, so as to suit the occasion. This suggestion was not acceded to, and the men, after waiting a considerable time, until about a quarter to eight, to see if ballot-papers came, left without voting. Ultimately the Presiding Officer determined to alter some of the absentee ballot-papers for Corangamite, which had the name of that electorate and the candidates for that electorate printed on them, so as to suit Ballarat. Two other men availed themselves of that means of voting, but Reason and Crowther had just left without being made aware of the intention to alter the printed ballot-paper. It was entirely due to official failure to provide sufficient absentee ballot-papers—I do not say whose failure it was—that Reason and Crowther did not vote. There were several other instances relied on by the petitioner, but for various reasons I find against allowing them. It appears then, so far, that seven persons duly qualified to vote and properly seeking to vote were, by official error, prevented from voting.

Here comes a very serious question, namely, what is the effect of this error, and whether it is permissible to receive evidence as to the intention of those electors to vote for the one or the other candidate. This is a question in which I feel I am required to state fully my reasons for the

conclusion I have arrived at. There can, of course, be no legal objection on the ground that the matter sought to be proved is intention only. That is done in ordinary practice (see *Halsbury's Laws of England*, vol. *xiii.*, p. 449). But it was objected on the part of the respondent that such evidence should be rejected in a case like the present, as tending to invade the secrecy of the ballot. Of course, as the electors referred to had not actually voted, it could not be put directly as a violation of the secrecy of the ballot. The contention, however, was that, in effect, it would be a departure from the policy of the Legislature as appearing from the *Electoral Act*. Sitting at Ballarat, and out of reach of almost all relevant authorities, I perforce adopted the course of taking the sworn testimony of the electors in question, subject to the objection, and not admitting it into the evidence unless and until on full consideration I should consider it admissible. Even now some of the authorities cited in text-books are not available. I have endeavoured to procure them from four States, but without success. There is a dictum to which I was referred in *Chanter v. Blackwood [No. 2]*[2]. The accuracy of that dictum in its entirety was not contended for. I am unable to reconcile it at all with the very distinct words of the Act to which I shall presently refer. It is not, in one branch, consistent with *Bridge v. Bowen*[3]. Apart from that dictum, there is no judicial authority directly in point. The *Australian Act* differs very considerably from the English legislation in several respects relevant to this case. Particularly I refer to the duty of the Court in the case of official errors. In England it is enacted that no election shall be declared invalid by reason of non-compliance with the election rules or mistake in the use of the forms, if it appears to the tribunal (1) that the election was conducted in accordance with the principles laid down in the body of the Act, and (2) that such non-compliance or mistake *did not affect* the result of the election. In other words, if the matter is left so that the mistake *may* have affected the result, the election may be declared invalid. Under our Act it is different. By sec. 194 it is provided that "No election shall be avoided ... on account of the ... error of any officer which shall not be proved to have affected the result of the election." The "result" means the return of the particular candidate, and not the number of his majority. This is the view expressed in the cases of *Clare Eastern Division*[4] and *Woodward v. Sarsons*[5], differing from the *Hackney Borough Case*[6]. *Rogers on Elections* (1918), 19th ed., vol. *ii.*, p. 68, supports this and adds a further authority, which I have not been able to examme.

The task, therefore, which the Legislature has expressly set the Court in such a case is to require, before avoiding an election on the ground of official error, proof that the error actually affected the return of the candidate. The error of refusing a vote to a qualified elector, if it is to have any weight at all, must be accompanied with proof as to how the elector intended to vote. In England, the mere refusal to permit qualified electors to vote would—if the numbers were sufficient—raise a possibility enabling the Court to act (*Rogers*, 19th ed., p. 109). I do not assume to say how the Court there would feel itself called upon to decide if evidence of intention negativing that possibility were offered. But with respect to our own Act it is plain that, unless some paramount purpose of the Legislature to exclude evidence of the elector's intention can be deduced by implication from the Act, sec. 194 requires the Court to receive that evidence. The case of *Bridge v. Bowen*[7] shows that, in view of the onus, unless the fact of intention is proved, the election, so far as it depends on the refusals I have mentioned, cannot be disputed. The matter must be determined on principle. The fundamental common law principle is that "elections ought to be free." That basic principle was reaffirmed and enforced by the Statute 3 Edw. I. c. 5. It lies at the root of all election law. For centuries parliamentary elections were conducted by open voting. Freedom of election was sought to be protected against intimidation, riots, duress, bribery, and undue influence of every sort. Nevertheless it was found necessary to introduce the ballot system of voting. The essential point to bear in mind in this connection is that the ballot itself is only a means to an end, and not the end itself. It is a method adopted in order to guard the franchise against external influences, and the end

aimed at is the free election of a representative by a majority of those entitled to vote. Secrecy is provided to guard that freedom of election. It is common ground, however, that in some cases, which need not be particularized, the Court is at liberty to inquire how a person voted. Sec. 190 provides that "the Court ... may inquire into the identity of persons, and whether their votes were improperly admitted or rejected, assuming the roll to be correct." Reading that section with sec. 194 (already quoted), it cannot be doubted that in some instances of actual voting it is proper for the Court to ascertain how a person voted. It is, in my opinion, impossible to contend that a person who was refused a ballot-paper altogether is in a worse position to defend his right of voting than if he had received a ballot-paper and his vote had been wrongly disallowed. And in such a case how is he to protect his right of franchise, which is the most important of all his public rights as a member of a self-governing community? The ballot, being a means of protecting the franchise, must not be made an instrument to defeat it. When a vote is recorded in writing, no doubt the writing itself is the proper evidence of the way the elector intended to vote. When it is not recorded, the only means of establishing that intention is the evidence of the elector himself. That is the only mode of protecting the right which an elector has endeavoured to exercise and has been prevented by official error from exercising. That the right of voting is a legal right sustainable in a Court of law is beyond doubt (*Ashby v. White*[8] and *Pryce v. Belcher*[9]). But, though technically remediable at law, not only is the remedy there for malicious refusal alone, but it is in any case practically worthless. It gives no real or effective protection to the elector's right politically: it gives no security that his political opinions will not be disregarded. A shilling damages is no compensation for improper representation in Parliament. This Court of Disputed Returns is the only tribunal that can afford real and effective protection to electors in maintaining their right of franchise. The Legislature has provided, by sec. 185, that the petition may be signed—as it is in the present case—by a "person who was qualified to vote" at the election. This indicates that the elector is afforded a means of protecting his right of franchise and representation. It was the common law doctrine that a voter whose vote was at issue was regarded for the purposes of evidence as a party, and at a period in our law when interested persons were incompetent witnesses on their own behalf, such a voter was precluded from substantiating his vote by his evidence (*Rogers on Law and Practice of Election Committees* (1852), 4th ed., p. 91). His declarations or admissions against himself, however, made before the election were admissible (*ibid.*). And see *The Middlesex Case*[10]), and per *Keogh* J. in the *Tipperary County Case*[11]. The importance of that allusion is that it shows how strongly the law regards the issue of a challenged vote as affecting directly the right of the elector himself. And as the Legislature has required by sec. 194 proof of actual affecting of the result as a condition of protection of the right of voting, it appears to me to be an inescapable conclusion that the elector may prove his intention, where he has been prevented from voting altogether. By no other means can he, or those who think with him, if in the majority, be protected against representation by the votes of the minority. If, for instance, candidate A be re-returned by a majority of 10 votes, while 50 persons who desired to vote for candidate B are refused ballot-papers, how are the majority, consistently with sec. 194, to be protected in their acknowledged right to elect the representative of the constituency if the intentions of the 50 are not to be proved? In the absence of express prohibition of such evidence I think it is admissible because its admission is in accordance with the general, well recognized principles of evidence, with which the Legislature must be presumed to be acquainted; because it supports the central principle of the Act, namely, representation by free votes of the majority of the electors; because it does not violate any ballot actually cast; and because to exclude the evidence on a supposed analogy to maintaining the secrecy of the ballot would be to proceed, not upon a real analogy, but on a contradiction. Its exclusion would exalt the means above the end; it would defeat the franchise instead of protecting it. I therefore decide that the evidence is admissible.

There are still two important considerations to bear in mind. Since such evidence is admissible to conserve the right of franchise of an elector who endeavoured to exert it, he cannot, in my opinion, be forced to disclose his intention. Compulsion of a person unwilling to state his intention would open the door to evils the law endeavours to suppress. It was for this reason that I studiously impressed on every witness the freedom to decline to state his or her intention, even though it was as to the past. In every case the intention was stated, not merely willingly, but eagerly. There was no doubt left in my mind that each of those electors was anxious to maintain his or her personal right to vote. That is the first consideration to which I refer. The second is this: admissibility of evidence is not equivalent to accepting it. I fully recognize the necessity after a closely contested election of carefully scrutinizing evidence of this nature. It is always possible that a witness who had not done all the law requires him to do in order to exercise his franchise, might afterwards, when so much depends on the matter, consciously or unconsciously carry his testimony beyond the exact truth. I have been critical of the evidence and studied the demeanour of the witnesses, so that, while conserving their right of voting, I might avoid the dangers of their political partisanship. And I have, in cases of doubt, given weight to the onus of proof.

I now come to the thirty absent votes. They were rejected, and rightly rejected, because the voters have not signed the necessary declarations. The remarkable fact is that in each instance the Presiding Officer has not merely allowed this omission to pass uncorrected, but has actually certified that the voter signed before him. It is difficult to understand how so many—over twenty—Presiding Officers in various parts of Victoria could sign such a certificate. I regret to say it, but it certainly is lamentable that such carelessness should be exhibited in a matter of such great public importance. The number of instances of this kind that have occurred show that it is desirable in future elections to call the special attention of Presiding Officers to the requirements of a valid attestation. The distinction between filling in the name of a voter in the body of the declaration and the signature of the voter at the foot of the declaration should be prominently brought to their mind. Confusion in that respect is the only possible explanation of the departure from the requirements of the law.

Next, there are eight declarations signed by the voters, but unattested by the Presiding Officer. This is also a fatal defect, and displays great carelessness where extreme care is necessary. Then come some votes that indicate neglect of a complicated variety. Enclosed in Ballarat envelopes there were sent to the Divisional Returning Officer for Ballarat nine absent voters' ballot-papers. But the ballot-papers were as follows: two for Bendigo, two for Corio, two for Grampians, two for Wimmera, and one for Henty. On one of these, one of the Wimmera ballot-papers having the names of the Wimmera candidates written on it, there are also written the names of the Ballarat candidates, as to which the elector apparently voted. But as he voted—so says the ballot-paper—for the Electorate of Wimmera, the Divisional Returning Officer disallowed the vote. I agree with him that it cannot be counted. The official negligence in these cases is deplorable. It is due to Mr. Anderson, the Divisional Returning Officer, to say that in these observations he is not included. That gentleman appears to have acted throughout with great care, discreetness and fairness, and has been of the greatest assistance to the Court in the course of this trial.

That completes the Ballarat portion of the case. That portion leaves so far unaltered the countable votes, and exhibits instances of seven improperly rejected votes, the effect of which on the final result depends entirely on the view I take of the Melbourne evidence. That evidence relates to a number of votes actually cast, some of which were rejected and others admitted by the Returning Officer whose decision is now challenged. Many of those instances depend on whether, as a matter of law, the provisions contained in the Act as to the method of voting are mandatory or directory, or,

as I should prefer to term it, imperative or optional. Sec. 124 provides for three methods of voting. Par. (a) deals with ordinary subdivisional voting, which for this purpose includes sec. 121; par. (b) with absent voting, and par. (c) with postal voting. First, as to par. (a). It enacts that preferences shall be indicated by the figures 1, 2, 3, 4, and so on, so as to indicate the order of preference desired by the voter. Sec. 133 enacts as to this, that non-compliance makes the ballot-paper informal, subject to two provisoes applicable to House of Representatives elections where there are not more than two candidates. In such cases it is sufficient to put the figure 1 in the square opposite the name of the candidate preferred and to leave the other square blank. In other words, since the other candidate is necessarily the second it is considered needless to place a 2 opposite his name. And further, instead of the figure 1, there may in such a case be a cross to indicate the first preference, which is, indeed, the only preference. Referring to an argument addressed to me, I may add that, just as it is quite right where there are only two candidates, and the figure 1 is used to indicate the preference, either to insert or to omit the figure 2 with respect to the other candidate, so where a cross is used instead of the 1, the figure 2 may similarly be inserted or omitted. In such a case either the 1 or the cross will indicate unequivocally the voter's first and only choice. If a voter places a 1 against one candidate and a cross against the other, he has left his preference entirely ambiguous—each mark, being of equal value, neutralizes the other.

I am impelled by some of the ballot-papers I have seen to observe that it is possible that some of the voters have been misled as to the use of a cross. When they have placed a 1 for one candidate and a cross for the other, it might be conjectured that they thought they were simply crossing out and voting against the other candidate. That being only conjecture, I am not entitled to act on it in deciding this case. But the possibility might be guarded against for the future. It is noticeable that although sec. 133 provides for a cross in substitution of the figure 1 in the cases mentioned, there is no reference to that in the ballot-paper, Form F in the Schedule. Perhaps some means of informing electors of the law as to the use of a cross may be desirable. It has been decided by this Court that the methods provided by the body of the Act itself are mandatory or imperative. Both parties here have maintained that view. I agree with it. It is supported by all relevant authorities (see *Phillips v. Goff*[12]), and on principle is obviously right. Since voting by ballot is intended to be secret—otherwise its value is destroyed—Parliament has devised means least likely in its opinion to disclose identity. A cross is little likely to disclose identity, and though figures present more opportunity for recognition they have been specifically directed. But it is plain that if voters were permitted to choose any method they preferred to indicate their choice, identification might easily be insisted on. Consequently, the whole reason of the thing points to the imperative character of the provisions in question being the proper construction. Sec. 217 (1) does not relax the imperative nature of the statutory requirements of sec. 124 (a). It permits of substantial compliance instead of strict compliance with regard to the forms in the Schedule.

With respect to sec. 124 (b), namely, "absent voting," the Act prescribes that the voter "shall mark his vote on his ballot-paper in the manner prescribed by those regulations." So we have to look for this to the relevant regulations. Those regulations, particularly reg. 61, practically make the same provision for marking a vote as par. (a) of sec. 124. Reg. 83A means, as I think after full consideration, the same as sec. 217 (1) of the Act. It makes substantial compliance instead of strict compliance sufficient as to the forms in the Schedule. The effect of sec. 124 (b) and the regulations is to make the prescribed methods of marking ballot-papers imperative. Reg. 59, besides requiring absent voters' declarations to be "duly signed and attested," affords an opportunity to the Presiding Officer, if he has omitted to attest a declaration, to certify that the omission was due to inadvertence and that the declaration was as a matter of fact duly signed in his presence. He must do that before the declaration of the poll. I have had no such healing certificate before me, though there were

several omissions to which it could have applied. These considerations enable me now to deal in detail with most of the Melbourne evidence. Other questions of law will be considered as they arise.

The first was a rejected vote. I have had great doubt about this. I am not surprised the Returning Officer disallowed it. I allow it as a vote to McGrath on the following grounds:—It is clear the voter intended to vote for that candidate, and the only question is whether the mark he made is a clumsy dot or a clumsy figure 1. It is very inartistic, but remembering that voters may be young or old, ill or well, scholarly or not, I resolve the doubtful question of form in favour of the franchise, there being no doubt as to the real intention. Twelve other ballot-papers were rejected, and I leave them so. They are plain instances of departure from the law as I have stated it. Two others were allowed to Kerby, and, in my opinion, rightly allowed. Another vote was allowed to Kerby. It is a curious vote. In each square is a cross; but in the Kerby square there is also the figure 1 and in the McGrath square there is also the figure 2. It is evident the voter made the figures the dominant expression of his intention, and the vote should stand as allowed. Two others were rejected, and properly so. Another vote deserves attention. In the Kerby square there is a cross, and in the McGrath square there is a clumsy dot or a clumsy figure 1. But in this instance the intention is clear to vote for Kerby. The vote was allowed to him by the Returning Officer, and I agree with him. The next is a vote rejected. It is an absent vote. The vote is perfectly regular in form. It is headed "The Electoral Division of Ballarat." It contains in the list of candidates the one name only, that of McGrath, and it has a very distinct figure 1 in the square opposite his name. The only objection really raised to the vote was that it offended against reg. 61 (1) (e), which provides that an absent voter's ballot-paper shall be informal "if in ... a House of Representatives election ... it has upon it any mark or writing (not lawfully authorized to be put upon it) by which in the opinion of the Divisional Returning Officer the voter can be identified." It is necessary first to explain the official practice in relation to absent voting. In each Electorate absent voting ballot-papers are supplied with the name of that Division, and the names of the candidates for that Division, printed on them. Then absent voting ballot-papers are also supplied with blanks for the names of the Division and the candidates. An absent voter for some other Division in the State states the name of the Division for which he desires to vote, and the Presiding Officer's duty is to write in the name of the Division and the names of the candidates, and hand the ballot-paper to the voter. In the present instance, the Presiding Officer wrote in ink the name of the Division, namely, "Ballarat," but omitted to fill in the names of the candidates. The voter, apparently thinking he himself had to fill in the name of the candidate he wished to vote for, wrote "McGrath" and filled in the figure 1. It is said that the fact that the voter wrote the name is a means of identifying him and the vote should be disallowed. I have considered the authorities cited: *Wigtown Case*[13]; *Stepney Case*[14]; *Buckrose Division Case*[15]; *Cirencester Case*[16]. I have also read in *Rogers on Elections*, 19th ed., vol. *ii.*, at p. 151, what appears to be a very full quotation from the *Exeter Case*[17], decided by *Channell* J. in 1911. In that case the learned Judge states the position in these terms:—"It seems to me that what you have to do when you have got ballot-papers of the kind such as we have been considering ... is to look at the paper and to form your own opinion upon looking at it whether what is there is put there by the voter for the purpose of indicating for whom he votes. ... It is perfectly possible that two crosses, or anything of that sort, may be used as devices for that purpose (i.e., identification) ... but if you come to the conclusion on looking at the paper that the real thing that the man has been doing is to try—badly and mistakenly, not understanding the Act of Parliament—to try to give his vote, and to make it clear whom he votes for ... then these marks are not to be considered to be marks of identification unless you have positive evidence of some agreement to show that it was so." The learned Judge further said: "It seems to me that when you find a ballot-paper which has got something clearly going beyond the intention to indicate for whom he votes, then you must hold that to be bad." He

refers to *Woodward v. Sarsons*[18] as an authority for that. Substantially I agree with that. The law in forbidding identification marks does not contemplate shutting out a transparently honest attempt to vote rendered necessary by the neglect of an official. This vote should be allowed to McGrath. Another vote was an absent vote rejected. As in the immediately preceding case, the ballot-paper was in blank and has had the name of the Division and the candidates filled in in writing. But it is clear that in this case the official wrote in all those particulars so far as they were written in. However he wrote in the names of the candidates thus:—

Kerby Edwin Thomas John.

David Charles.

The name "McGrath" does not appear. In the square opposite "Kerby" there is the figure 2, and in the square opposite "David" is the figure 1. The petitioner claims that as a vote for McGrath, whose Christian names are David Charles. But I am bound to hold that the vote was properly rejected, because the terms of the law so require. Reg. 52 requires that the names of the candidates are to be either "printed or written" on the ballot-paper. That is relaxed to this extent, that by reg. 61 (3) it is provided that the ballot-paper shall not be rejected as informal "merely because the surname only of any candidate has been written thereon, if no other candidate has the same surname." On the principle of *expressio unius est exclusio alterius* it seems clear, on the whole, that unless the surname of the candidate is there the vote is informal. Of two other votes the relaxation just mentioned operates to save one, but there is nothing to save the other, and the Returning Officer's rejection must stand. Those were all votes claimed or objected to by the petitioner.

I now come to some votes claimed or objected to by the respondent. The first is a vote rejected. In the square opposite Kerby is a very distinct, and, as I may say, determined figure 1. In the McGrath square, there is a very faint figure 1, which appears clear to me, having regard to the whole ballot-paper, to have been rubbed out as well as it could be, with the finger. I have no doubt the voter intended to vote for Kerby, and I take the rubbing out as effectual and allow the vote accordingly to the respondent. The next is, on the face of it, a perfectly valid vote for Kerby. It was rejected by the Returning Officer apparently because on the back in blue pencil, evidently the work of the voter, are the initials "A.B." in script. I apply to this ballot-paper the principles already stated with reference to identification marks. I can see no reason whatever for a voter putting such marks on the back of his ballot-paper except to identify him, and in my opinion the Returning Officer properly rejected the vote. Then come seven votes rejected. They are clearly informal. The next is a rejected vote. This, like the first, has given me great cause for consideration. The voter has put nothing whatever in the McGrath square. In the Kerby square he originally had a cross. That cross has been carefully and laboriously covered, not with mere lines of obliteration, but with a very thick figure which may be intended for a very thick figure 1 or a very heavy mark of effacement only. Acting on the same principles as with regard to the first, and in favour of conserving the franchise, so far as the law allows me, to every elector who intends to vote, I think I should, as before, resolve a doubt as to form in favour of the substantial right to vote. I allow this vote to Kerby. The next are three votes where the figure 1 is placed for one candidate, and a cross for the other. The marks, in law, cancel each other. The Returning Officer rejected these votes, and rightly so. Another vote was admitted for McGrath. The respondent claims to reject it. In each square there has been a cross, and over the cross there have been written figures: in the Kerby square the figure 2, and in the McGrath square a very decided 1. It is possible to regard the mark in the McGrath square as a cross, but that would not alter the result of the vote. On the whole, it appears to me, however, to be as I have stated, and I leave the vote as counted. The next was rejected, and obviously so. The name of Kerby alone is

written in the place for candidates, but the square is entirely blank. Then comes an absent voter's certificate, on which the voter has made a declaration; he happened to be the Presiding Officer, and he purported to attest his own signature. It is clear both from the language and the policy of the regulations, in order to have a check on the voter, and from the inherent meaning of an attestation, that the voter himself cannot be the attesting witness to his own declaration. I need not quote the law in detail: it is perfectly clear. The ballot-paper was rejected, and rightly. The next is in the same position as the last. Another is an absent voter's envelope, rejected. The Presiding Officer purported to attest the signature of the voter, but the voter did not sign. This vote was, in fact, abandoned by learned counsel.

That completes the Melbourne evidence. The result of that evidence is to add two votes to each candidate, leaving Kerby still with a majority of one of the countable votes. But a fifth vote is informal, and, through official error, not countable. There cannot be any doubt that, but for that official error in omitting the surname "McGrath," that vote would have made the numbers equal. In such case sec. 136 (7) would have applied, and the Divisional Returning Officer would have been called on to decide by his casting vote which should be elected. It is unnecessary to say, if the matter rested there, what course, in view of sec. 194, it would have been proper to take. As it is, the official errors appearing in the Ballarat section of this case place the matter beyond question. It is clearly proved that they affected the result, and it is the duty of the Court, in compliance with the Act, to declare, and it is hereby declared, that Edwin Thomas John Kerby was not duly elected for Ballarat and that the election for that Division on 13th December 1919 was absolutely void. No costs. Deposit ought to be returned.

Declare that respondent was not duly elected and that the election was void. Deposit to be returned.

Solicitor for the petitioner, M. Blackburn.

Solicitors for the respondent, Arthur Robinson & Co.

[1] 4 O'M. & H., 96, at p. 102.

[2] [1904] HCA 48; 1 C.L.R., 121, at p. 131.

[3] [1916] HCA 38; 21 C.L.R., 582.

[4] 4 O'M. & H., 161.

[5] L.R. 10 C.P., 733.

[6] 2 O'M. & H., 77.

[7] [1916] HCA 38; 21 C.L.R., 582.

[8] 1 Sm. L.C., 266.

[9] [1846] EngR 686; 3 C.B., 58; 4 C.B., 866.

[10] 2 Peck., 118, at p. 141.

[11] 3 O'M. & H., 19, at p. 34.

[12] 17 Q.B.D., 805, at p. 812.

[13] 2 O'M. & H., 215.

[14] 4 O'M. & H., 34.

[15] 4 O'M & H., 110, at p. 112.

[16] 4 O'M. & H., 194.

[17] 6 O'M. & H., 231.

[18] L.R. 10 C.P., 733.

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