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Bryant, referred to *Rivington* v. *Garden*, (1901) 1 Ch., 561; *Pascoe* v. *Puleson*, (1886) 54 L.T., 733; *Nicholson* v. *Colonial Mutual Insurance Co.*, (1887) 8 A.L.T., 173; 13 V.L.R., 58, at p. 64.

GRIFFITH, C.J.—I think a claim to set aside a parliamentary election is a matter of as great importance as any that can be raised in any Court. I regard this, therefore, as a matter of importance. It is also a matter of considerable difficulty. But the difficulty has arisen from the manner in which the Act is framed, and from the action of the electoral officers in the arrangement for the election. It would be hard to make the respondent pay for those mistakes, or to pay more because of them. I think, for these reasons, that under the circumstances of this case I ought not to make an order for taxation on the higher scale.

Solicitors, for petitioner, *Quick Hyett & Rymer*, Bendigo.

Solicitors, for respondent, *Blake & Riggall*, Melbourne.

[HIGH COURT OF AUSTRALIA.]

MAXIMILIAN HIRSCH . . . . . PETITIONER;

AND

PHAREZ PHILLIPS . . . . . RESPONDENT.

WIMMERA ELECTION PETITION.

ON REFERENCE FROM THE COURT OF DISPUTED RETURNS.

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March 11, 12.

Griffith, C.J., Barton and O'Connor, JJ.

Commonwealth Electoral Act 1902 (*No.* 19 *of* 1902), *secs.* 139, 153; *Schedule, Form Q—Election—Adjourned poll—Persons entitled to vote—Voter absent from polling place for which enrolled—Refusal of Returning Officer to receive votes of "absent electors"—Void election.*

Where, pursuant to sec. 153 of the *Commonwealth Electoral Act* 1902, the polling at a polling booth has been adjourned to a subsequent day, the persons entitled under sec. 139 to vote at that polling booth on signing a declaration in

Form Q in the Schedule are those who, on the original polling day, were absent from the polling place for which they are enrolled.

The words "absent from the polling place" in sec. 139 mean "absent from the locality of the polling place."

The Presiding Officer at an adjourned poll refused to receive the votes of any electors claiming to vote under sec. 139 (*i.e.* upon making declarations in Form Q.) : *Held*, that in order to invalidate the election on the ground of such refusal it must be shown that the number of electors entitled to vote in that manner whose votes were refused was such that the result of the election might have been affected by the refusal.

At an election for the House of Representatives for the Electoral Division of Wimmera, in the State of Victoria, held on 16th and 23rd December, 1903, there were two candidates, Maximilian Hirsch and Pharez Phillips, the latter of whom was, on 29th December, 1903, declared by the Returning Officer to have been duly elected. Hirsch thereupon filed a petition praying that it might be declared that Phillips was not duly elected, and that the election was absolutely void, or alternatively that the election might be declared void with regard to certain polling places, and that a new poll might be taken there, or that a new poll should be taken at certain polling places.

The petition contained the following allegations (*inter alia*), viz. :—

"5. That on the 16th day of December, 1903, the polling for the said election took place at all the polling places in the said division with the exception of the polling place at Ni Ni, which was not opened at all.

"6. That on the 23rd day of December, 1903, the Ni Ni polling booth was opened for polling, and the votes recorded at that place, and on that date were counted together with the other votes recorded for the said division.

"15. That the advertisements notifying the adjourned poll to be held at Ni Ni on the said 23rd day of December, 1903, also contained a notification that voting under Q forms (under the provisions of sec. 139 of the said Act) would not be permitted.

"16. That in consequence of the notification referred to in the last preceding paragraph many persons entitled to record their votes at Ni Ni polling booth under the provisions of the said sec.

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139, and desirous of voting for the petitioner, refrained from attending at the said booth to do so.

"17. That on the said 23rd day of December, 1903, certain persons intending to vote for the petitioner attended at the Ni Ni polling booth and applied to be allowed to record their votes under the provisions of the said sec. 139, but were refused permission to do so by the presiding officer, and that such persons included :—

"(*a*) Persons enrolled for polling places other than Ni Ni, who had, on the 16th day of December, 1903, actually attended at the Ni Ni booth for the purpose of recording their votes in favour of the petitioner under the provisions of the said sec. 139, but who found that the said booth was not open.

"(*b*) Persons enrolled for polling places other than Ni Ni, who on the 16th and the 23rd days of December, 1903, were entitled to vote at the Ni Ni booth under the provisions by the said sec. 139, they having been on both the said dates absent from the polling places for which they were enrolled.

"(*c*) Persons enrolled for polling places other than Ni Ni, who on the 23rd day of December, 1903, were entitled to vote at the Ni Ni booth, they not having previously voted at the said election, and being on that date absent from the polling place for which they were enrolled.

"20. That the petitioner believes that but for the irregularities referred to in paragraphs 7 to 19 inclusive of this petition, he would have obtained a majority of votes at the said election, and that such irregularities actually affected the result of the said election."

The petition, coming on for hearing before *Griffith*, C.J., he, by consent of the parties, ordered the following question to be set down for hearing before the full Court, viz. :—

"Whether the facts alleged in the paragraphs numbered 15, 16, 17, and 20 in the petition herein constitute a valid ground for disputing the election, the subject-matter of the said petition."

Mitchell, for the petitioner. The Returning Officer was clearly wrong in refusing to receive "Form Q" votes. It is then sufficient for the petitioner to show that the result of the election

may have been affected by such refusal in order to entitle him to have the election upset; *Woodward* v. *Sarsons*, (1875) L.R., 10 C.P., 733. He has not to show that if the votes had been allowed the result would have been different. The respondent's majority was 167, and there were over 6,000 votes not recorded.

[GRIFFITH, C.J.—I think you would have to show that a number of electors sufficient to turn the scale were actually deprived of the right of voting.]

Sec. 139 (1) of the *Commonwealth Electoral Act* applies to adjourned polls as well as to the original polling day where a voter votes within the Division for which he is enrolled. The notification by the Returning Officer takes away the facilities intended to be afforded by sec. 139 (1).

All those persons who had not voted on the original polling day might have voted at Ni Ni on the adjourned polling day, or at any rate all those of them who on the original polling day were absent from the polling places for which they were enrolled might have voted on the adjourned polling day.

MacCay, for the respondent. The petition is bad in form, and does not make a *primâ facie* case apart from the point of law raised. Sec. 194 requires the petition to set out the facts relied on, and to be filed within 40 days after the return of the writ. After that time the petition cannot be amended. There should have been an allegation that the irregularities complained of affected the result of the election. There should also have been an allegation that the persons mentioned in paragraph 16 of the petition were entitled to vote for the Wimmera Division. These omissions invalidate the petition.

[GRIFFITH, C.J., referred to sec. 199 of the *Commonwealth Electoral Act*, and to sec. 23 of the *High Court Procedure Act* 1903.]

Sec. 199 means that once the case is before the Court the Court can then disregard legal forms and technicalities, but it does not limit the provisions of sec. 194 as to the necessity for setting out the facts.

[O'CONNOR, J.—Even if there is no power of amendment, must not the allegations in paragraph 16 imply the allegation of all facts necessary to support the petition?]

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To set out the facts relied on does not mean setting out facts from which other facts may be implied.

[GRIFFITH, C.J.—The paragraph can mean nothing else than that the persons were enrolled for the Wimmera Division.]

Paragraph 20 only alleges a belief on the part of the petitioner. If that belief were proved to exist it would not enable the Court to find anything with regard to the facts which were believed to exist. It must be proved that the belief is correct.

GRIFFITH, C.J. We are all of opinion that there is nothing in the objection.

MacCay on the merits. The provision in sec. 139 (1) enabling a person absent from the polling place for which he is enrolled to vote at another polling place, must be limited to the day on which the original poll is taken. There are only three classes of persons entitled to vote. Every one has a right to vote at the polling place for which he is enrolled. Electors may vote elsewhere, but only such electors as could, if present at the polling place for which they are enrolled, vote there. That is, if present there on the day the poll is taken. Such persons cannot take advantage of an adjournment. Under sec. 153 the presiding officer who has charge only of a particular polling place, can only adjourn the poll at that particular polling place. He cannot adjourn the whole poll. The qualification for voting at a polling place other than that for which a person is enrolled is absence from the polling place for which he is enrolled. The object of an adjournment of the poll at a particular polling place is to prevent the disfranchisement of those who could and would have voted there on the original polling day, and unless a person could and would have voted there on that original day he may not vote on the adjourned polling day.

[BARTON, J.—Can a man be said to be absent from the polling place for which he is enrolled if that polling place is not open?]

No doubt persons in class (*a*) mentioned in paragraph 17 are in a different position from those in classes (*b*) and (*c*). Those in classes (*b*) and (*c*) did not fulfil the conditions precedent to their right to vote. But none of the persons in any of those three

classes were entitled to vote. Those in class (*b*) were said to have been absent on the original polling day from the polling places for which they were enrolled, but it is not said that they were not near some other polling place. The main contention, then, is that an elector has no right to vote elsewhere than at the polling place for which he in enrolled, unless on that day he could vote at the polling place for which he is enrolled, if he were present there.

Mitchell, in reply. Any construction which could be placed on sec. 139 so as to deprive voters in classes (*b*) and (*c*) of their right to vote on the adjourned polling day would also deprive those in class (*a*) of their right.

[GRIFFITH, C.J.—Do not the words "if he is absent," in sec. 139, assume that there is a place at which the voter might be effectively present ?]

The words "polling place for which he is enrolled," are merely descriptive.

[O'CONNOR, J.—Must not the words "if he is absent" imply that he is present at some other polling place ?]

That may have been the intention of the legislature, but they have not said so. Such a construction would also deprive those in class (*a*) of their right to vote.

[GRIFFITH, C.J.—The "other" polling place referred to at the end of sec. 139 (1) is one that is open, and at which there is a presiding officer. Why should not the polling place referred to at the beginning be also one that is open, and at which there is a presiding officer ?]

That construction would render every vote on a Q form bad, unless the polling place for which the voter was enrolled was open on the day on which the vote was cast. So that any votes of voters enrolled for Ni Ni, given on the original polling day at other polling places, would be bad. None of the questions which, under sec. 141, may be put to a voter, go to the question whether the polling place for which he is enrolled is open. The presiding officer could not know whether it was open or not.

Cur. adv. vult.

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12th March.

GRIFFITH, C.J., delivered the judgment of the Court. The point raised on this petition is one of some difficulty, and we feel ourselves very much indebted to counsel on both sides for the assistance they have given us.

With respect to the technical point as to the form of the petition, it should be said that the word "believe" is not a proper word to use in a petition. It should set out facts. The petitioner is not called upon to verify the petition by his oath, but he should, of course, only allege what he believes he will be able to prove. The insertion of the word believe, however, does not in our opinion vitiate the petition.

The main question is, who may vote on an adjourned polling day? Sec. 153 of the *Electoral Act* provides that "If from any cause any polling booth at a polling place is not opened on polling day the Returning Officer or the presiding officer may adjourn the polling for a period not to exceed twenty-one days, and shall forthwith give public notice of the adjournment." It is contended for the petitioner that on an adjourned polling day any elector whose name is on the roll may vote—those enrolled for the particular polling place, of course, but also any other electors on the roll on making the declaration in the Form Q. It is contended for the respondent that on that day nobody can vote except electors on the roll for that particular polling place, or, at most, electors who, not being on the roll for that polling place, attended there on the original polling day and were deprived of the franchise by its not being open. It is pointed out that, if the view of the petitioner is accepted, the result would be that if one polling place is by accident not open on the original polling day, there would, in effect, be two entirely separate polls for the whole electorate. For, when the adjourned polling day comes, each candidate will know exactly how many votes have been cast for him, and will collect all the voters he can who have not already voted, and bring them to this one polling place where an adjournment was necessary. So that, practically, there would be a second poll. In view of the provision that all elections for the House of Representatives shall be held on one day, it is plain that the legislature thought that such a thing would be very undesirable. It is not as if this were new legislation. It was the practice in many of the States

for a long time, and still is in one, if not most, of them, that all elections shall take place on the same day. Sec. 153 was evidently inserted for the purpose of affording to persons who had accidentally lost their right to vote, the opportunity of exercising the franchise. It is said, however, that this view is consistent with the literal terms of sec. 139, which provides that "Any elector may vote at the polling place for which he is enrolled, or if he is absent from the polling place for which he is enrolled may vote at any other polling place for the same Division in an election for the House of Representatives, if he makes and signs before the presiding officer a declaration in the Form Q in the Schedule." It is contended, on the other hand, that, adopting that construction, no meaning is given to the words "absent from the polling place," because a man who is present at one polling place is necessarily absent from another, and the section would have exactly the same meaning if these words had been omitted. That is to say, it might run "any elector may vote at the polling place for which he is enrolled, or at any other polling place for the same division if," &c. That seems, at first sight, a weighty argument. But on examination it will be seen that sec. 139 is a section which prescribes the conditions under which the right to vote may be exercised. It is one of a group of sections dealing with the polling on the duly appointed polling day, which is to be one day for the whole Commonwealth, and it is plain that every provision of that group is *primâ facie* intended to refer to that day. Now, to read a section as specifically applying to the thing specifically dealt with, is not to insert words. The whole of these sections are dealing primarily with the polling day, and the words "on the polling day" might be read into nearly every one of them without altering in any way their meaning. Sec. 139 prescribes what persons may vote on the polling day. One class of persons who have a right to vote consists of electors present at the polling place for which they are enrolled. They may vote at that polling place. Then, persons absent from the polling place for which they are enrolled, who may vote at any other polling place on making a declaration in the Form Q. The fact of absence or presence is necessarily ascertained on that day. For the purposes of the matter now under consideration the first class may be left out

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altogether. We are only dealing with persons who claim to vote on making a declaration in the Form Q. The material words so far as they apply to this class are: "Any elector . . . . if he is absent from the polling place for which he is enrolled may vote at any other polling place for the same division if he makes and signs before the presiding officer a declaration in the Form Q in the Schedule." There are thus two classes of persons who may vote on that day. Persons who are enrolled for any polling place may vote there, if present; of course, they cannot vote there if they are not present. Persons who are absent on that day from the polling place for which they are enrolled may vote anywhere else on making the declaration in the Form Q. Those are the two classes. If the word "absent" is treated merely as referring to absence from the place without any reference to time, it would be meaningless. A man must be absent from one place in order to be present at another. But if the word "absent" is taken with reference to the polling day, the section operates to confer on a voter who is on that day absent from the polling place for which he is enrolled a right to vote at any other polling place, which right, having been conferred, remains in existence so long as he is entitled to exercise it. It is quite clear that sec. 153 was not intended either to confer upon any elector a new right to vote which he had not on the original polling day, or to deprive any elector of any right which he had on the original polling day. The test, therefore, as to these persons is, whether on the original polling day they were absent from the polling place for which they were enrolled. If they were, they were and remained entitled to vote at another polling place. There are no words to take that right away from them. If sec. 153 is construed as only giving a fresh opportunity to electors who were actually deprived of it on that original polling day, this singular consequence would follow: That electors enrolled for the polling place at which the adjourned poll is taken, who were present at that place on the original polling day, and did not then claim or intend to vote, would not be allowed to vote at the adjourned poll. But it is clear that at the adjourned poll all electors enrolled for the polling place at which it is held are entitled to vote there, whether they were or were not present on the original day, and whether they then

did or did not claim to vote. Any other construction would involve an enquiry in every instance as to how many had been actually deprived of their right to vote on the original polling day, a thing practically incapable of proof. But if all the electors enrolled for that polling place are entitled to vote, whether they had intended to vote on the original polling day or not, how can a distinction be drawn between that class of persons and others who were on that day equally entitled to vote there? The one case is quite as incapable of enquiry or proof as the other. Let us take a case as an illustration. Suppose a polling place near a stream, which on the polling day is separated by an impassable torrent from the residence of the presiding officer. Nobody takes the trouble to go to the polling place, because everybody knows that the presiding officer will not be there. The test of actual deprival cannot be applied. It is not persons who were deprived of the right to vote on the original polling day who may vote on the adjourned polling day, but persons who, if the polling place had been open on the original polling day, would have been entitled to vote there. That construction gives full effect to every word of sec. 139.

It does, however, give rise to a practical difficulty, because the Returning Officer on the adjourned polling day is not entitled to do more than ask voters the questions prescribed by sec. 141, and the answers to them are conclusive. If an elector not enrolled for the polling place in respect of which the poll is adjourned wants to vote, he need only make a declaration in the Form Q, and the Returning Officer is bound to receive his vote. If he is not entitled to vote, still the Returning Officer cannot make any further inquiry, and consequently this Court must make the inquiry. Therefore if a man, not entitled to vote, because he was not absent on the original polling day from the place for which he was enrolled, came and insisted that his vote should be received by the Returning Officer, his vote would be bad, and a sufficient number of such votes might vitiate the election. But in this case that difficulty does not arise as to elections in class (*c*)—that is, persons not alleged to have been absent on the original polling day from the polling place for which they were enrolled—because all the votes were refused; and though the Returning

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Officer was technically wrong in refusing to allow them to vote, we cannot hold that the election was thereby vitiated. It follows from the reasons I have given, that electors in classes (*a*) and (*b*)—that is, persons who had attended at Ni Ni on the original polling day, being then enrolled for other polling places, and persons who on the original polling day were absent from the polling places for which they were enrolled—were entitled to vote, and if this right was denied to a number of persons so entitled sufficient to turn the scale, the petitioner would be entitled to have the election set aside. It is desirable to point out that paragraph 17 of the petition contains immaterial allegations as to both classes (*a*) and (*b*). The only material fact is that certain electors of each class were on 16th December absent from the polling place for which they were enrolled. The mode in which they intended to vote is, of course, not the subject of inquiry before this tribunal.

Mitchell.—The Court does not say what "absent from the polling place" means.

GRIFFITH, C.J.—That is a question of fact, which in some cases is very difficult, in others very easy, to answer. We think those words mean "absent from the locality of the polling place." What are the boundaries of any particular locality is a question to which it is impossible to give a general answer.

The costs of the reference will be in the discretion of the Judge who hears the petition.

Questions answered accordingly.

Solicitors, for the petitioner, *a'Beckett & Chomley*, Melbourne.

Solicitors, for the respondent, *McCay & Thwaites*, Castlemaine.