[HIGH COURT OF AUSTRALIA.]

JOHN MOORE CHANTER . . . PETITIONER;

AND

ROBERT OFFICER BLACKWOOD . . RESPONDENT.

(No. 2).

RIVERINA ELECTION PETITION.

H .C. OF A. 1904.

Commonwealth Electoral Act 1902 (*No.* 19 *of* 1902), *secs.* 109, 111, 112, 119, 122, 134, 147, 148, 158, 199, 200; *Schedule Form K, Form Q—Election—Compliance with Form Q—Mandatory or directory—Initialling ballot-papers upon front—Postal votes—Numbers on counterfoils transposed—Postal votes not received before close of poll—Postal votes given by marksmen—Jurisdiction of Court to inquire how voter has voted—Secrecy of ballot—Declaring election void—Costs on higher scale.*

March 10, 11, 12.

April 11, 12, 13.

Griffith, C.J.

A substantial compliance with Form Q in the Schedule to the *Commonwealth Electoral Act* 1902 is sufficient to entitle a voter absent from the polling place for which he is enrolled to vote at another polling place within the Division.

The provision in sec. 134 that the initials of the presiding officer shall be upon the backs of ballot-papers is directory only.

Held, therefore, that ballot-papers having the initials upon their faces, but in such a position that when the papers were folded as required by sec. 147 the initials could be seen by the presiding officer, were not thereby invalidated.

The mere fact that the number on the counterfoil to a postal ballot-paper does not correspond with the number on the application is not necessarily of itself sufficient to invalidate the vote.

The effect of sec. 119 is that postal votes not received by the Returning Officer at the close of the poll are invalid, even though they may have then been received by an Assistant Returning Officer.

It is mandatory that a person who wishes to vote by post shall sign his name to the application and also to the counterfoil.

Held, therefore, that a marksman is not entitled to vote by post.

Effect of various markings of ballot-papers considered and decided.

The High Court has no jurisdiction to inquire for which candidate a voter has voted, and therefore cannot direct a scrutiny for determining such a question.

H. C. OF A. 1904.

CHANTER v. BLACKWOOD. (No. 2).

If at an election the number of persons not entitled to vote who have been allowed to vote, or of persons entitled to vote who have been prevented from voting, or of both, is greater than the difference between the number of votes cast for the candidate declared by the Returning Officer to have been elected and that of votes cast for the candidate declared to have the next highest number of votes, the election is void.

Application for costs on higher scale refused.

HEARING of Election Petition.

On the hearing of a petition by Henry Moore Chanter against the return of Robert Officer Blackwood at an election for the House of Representatives for the Electoral Division of Riverina certain questions were referred to the Full Court by *Griffith*, C.J. (*ante*, p. 39). The result of the answers to those questions was that the petitioner had a majority of the votes.

Upon the matter again coming before *Griffith*, C.J., a recount of the votes was, on the application of the respondent, ordered to be taken before the Deputy Registrar.

The Report of the Deputy Registrar showed a majority of 57 votes in favour of the petitioner, and a number of votes which were objected to by the petitioner and respondent respectively were reserved for the determination of the Court.

The respondent by the objections delivered by him challenged the validity (*inter alia*) of a large number of "Form Q" votes and postal votes upon various grounds.

One class of objection to Form Q votes was that the name of the voter was omitted from the body of the Form, and that words were left out which made the promise by the voter not to vote again, meaningless.

Bryant, for the respondent. The provisions of Form Q are just as mandatory as those of Form K. The making of a declaration in Form Q is a condition precedent to the voter exercising the privilege, and must be strictly followed. The Form must be complete in itself.

Sir John Quick, for the petitioner.

GRIFFITH, C.J.—I think if I were to give any weight to objections of this kind, I should be disregarding sec. 199. It is enough if there is a substantial compliance with the Form.

Another class of objection to Form Q votes was based on the omission of the name of the Division, and the insertion of the name of the polling place for which the voter was enrolled in the space intended for the name of the Division instead of in its proper place.

GRIFFITH, C.J.—A document should be interpreted so as to give effect to it. Enough is stated to enable a person with the electoral rolls before him to identify the voter. All the essential facts required to be stated in Form Q are stated. I overrule the objection.

Another objection was that the initials of the presiding officer were on the front instead of the back of certain ballot-papers.

Bryant. The provision in sec. 134 that the initials shall be placed on the back is mandatory. Sec. 158 provides that the ballot-paper is to be informal if it is not "duly initialled": that must mean initialled upon the back. The object is to enable the presiding officer to see that the ballot-paper put in the box is that which was given by him to the voter. See sec. 147.

Sir John Quick.—Sec. 134 is directory only. The words "duly initialled" in sec. 148 mean initialled so that the ballot-paper can be recognized. Here the corners could be so folded back as to enable sec. 147 to be complied with. This is an error of an officer, and the onus is on the respondent to show that the result of the election has been affected. See sec. 200.

Bryant.—Sec. 200 only applies where the Act makes no special provision.

GRIFFITH, C.J.—In considering whether the provisions of a Statute are mandatory or directory regard must always be had to the object of the Statute. That was pointed out by the Full Court recently in *Chanter* v. *Blackwood* (*ante*, p. 39), and *Maloney* v. *McEacharn* (*ante*, p. 77). The object in this case is to enable the electors to exercise the franchise, and certain regulations have been made to ensure that every elector shall have an opportunity of voting, and that no one who is not entitled to vote shall vote. One of the provisions for preventing persons not entitled to vote from voting is that every ballot-paper shall be initialled. That is provided for by sec. 134, and the object is

H. C. OF A. 1904.

CHANTER v. BLACKWOOD. (No. 2).

shown by secs. 147 and 158. Sec. 147 provides that the voter, after he has marked his ballot-paper and before he puts it in the ballot box, must show the presiding officer the initials of that officer upon the ballot-paper. The object is to prove by ocular demonstration the authenticity of the ballot-paper. Sec. 158 provides that a ballot-paper shall be informal if "it is not duly initialled by the presiding officer." Having regard to these provisions, I feel compelled to come to the conclusion that the direction that the initials of the presiding officer shall be on the back of the ballot-paper is directory in this sense—that the ballot-paper is not necessarily informal by reason of the initials being on the front of the ballot-paper, if they are put in such a place that all the other provisions of the Act can be complied with. So that if the initials are on the front, but so near the corner that by folding back that corner they may be seen when the paper is folded as required by sec. 147, the ballot-paper is not necessarily bad. It appears, on examining these papers, that in nearly every, if not every, instance the corners were actually so folded. For this reason I hold that this is an error within the meaning of sec. 200, which prohibits the avoidance of an election in the case of such an error which is not proved to have affected the result of the election. To say that every error of this sort should invalidate an election would be to give no meaning to sec. 200. I therefore allow all these votes.

In the case of four postal votes, the numbers upon the applications did not correspond with the numbers upon the counterfoils of the ballot-papers.

GRIFFITH, C.J.—Sec. 111 requires the Returning Officer to initial all postal ballot-papers issued and to keep and number the applications in consecutive order, writing the corresponding number on the counterfoils of the ballot-papers. Four postal votes have been rejected; they are sealed up and have not been opened, so that it is not known in whose favour the votes are. Two of the applications are numbered 130 and 139 respectively; they were made at the same place, on the same day, and in the presence of the same person, by persons with the same surname who were apparently husband and wife or brother and

sister. The Returning Officer when numbering the counterfoils transposed the numbers. I think the provisions of sec. 111 are not in themselves sufficient to exclude the counting of these votes. The signatures on the counterfoils are obviously those of the same persons who signed the applications. I think, therefore, that these two votes should be allowed. The other two votes are practically in the same position, but the surnames of the two persons are not the same. They were both employed at the same place and in the same capacity. The applications were made on the same day, at the same place, and were witnessed by the same person. The Returning Officer again transposed the numbers on the counterfoils. I think these two votes also should be counted.

A certain postal vote was not received by the Returning Officer until after the close of the poll; he therefore rejected it at the scrutiny. It appeared that on receipt of the application for a postal vote the Returning Officer sent to the applicant the necessary documents and an envelope addressed to the Assistant Returning Officer, Balranald, which was not the principal polling place for the Division. The Assistant Returning Officer received the ballot-papers in the envelope so addressed before the polling day, and sent it on to the Returning Officer, but it was not received by him until the poll had closed. It was now contended that the vote should have been counted.

GRIFFITH, C.J.—Sec. 119 is precise in its terms; that at the scrutiny the officer conducting the scrutiny shall produce, unopened, all envelopes containing postal votes "received up to the close of the poll." That must mean, I think, postal votes received by the person whose exclusive duty it is to receive them, viz., the Returning Officer at the chief polling place of the Division. This particular envelope appears to have been sent out by the Returning Officer wrongly addressed, and consequently the ballot-paper did not reach him until after the poll had closed. I think the elector has lost his vote, just as he would have done if he had been told that the election was not to be held until the next day.

Certain applications for postal votes and counterfoils to ballot-

H. C. OF A. 1904.

CHANTER v. BLACKWOOD. (No. 2).

papers were executed by the voter making his mark instead of writing his signature.

Bryant. A marksman cannot exercise the privilege of voting by post. The provisions as to the voter signing the application and the counterfoil are mandatory. The signatures on those two documents must be compared in order to see that the person who applied for the postal ballot-paper is the same person who votes. See secs. 109, 112, 119, Form K. The only provision for another person assisting the voter in the case of postal voting is that in sec. 122, and that only applies to a voter with impaired sight, in which case the witness may mark the ballot-paper for him. Sec. 148 is the only provision for illiterate voters, and it does not apply to postal voting.

Sir John Quick.—The signature to the application and counterfoil may be by someone on behalf of and with the authority of the voter; otherwise all illiterate persons and all persons too ill to write, would be debarred from voting by post.

GRIFFITH, C.J.—I apply the same rule in determining whether the provisions of secs. 109 and 112 are mandatory or directory, as was applied by the Full Court, viz., that it is necessary to see what is the intention of the Act. The intention here is to allow a person unable to attend the polling place, to vote, but under certain safeguards. The first safeguard is that the application shall be attested by one of certain classes of persons. That the Court has held to be imperative, because of the importance of preventing fraud in obtaining postal ballot-papers. The second safeguard is that the counterfoil shall be attested by one of certain other classes of persons. The third safeguard is that the voter shall sign his name on the counterfoil. If the Act had stopped at the second safeguard I might have had some doubt about the matter. But I have to decide whether the signing by the voter of his name on the counterfoil is mandatory or directory. To decide that I must see what is the intention of the Act. Before a postal vote is counted the officer conducting the scrutiny is required by sec. 112 (*b*) to "compare the signature of the voter on the counterfoil with the signature to the application," to "allow the scrutineers to inspect both signatures," and to "determine whether the signature on the ballot-paper is that of

the applicant." I think it is impossible to read that section without saying that the direction to the voter to sign the application and counterfoil is mandatory, and that if a person through illness or illiteracy is unable to comply with that condition, he cannot take advantage of the privilege of voting by post. I think, therefore, that all postal votes given upon applications or counterfoils signed by marksmen must be rejected.

Of the ballot-papers objected to by either party, *Griffith*, C.J., admitted those marked as follows :—

With a cross opposite one candidate's name, and a fainter cross, apparently the imprint of the first cross caused when folding the paper, opposite the name of the other candidate.

With a cross on the left hand side of the name of one candidate.

With initials other than those of the presiding officer on the back, and apparently placed there during or after the scrutiny.

With full name of presiding officer on back instead of his initials only.

Upon a number of ballot-papers a presiding officer had, before the poll opened, marked successive numbers. It appears that he had done this in order to keep a record of the total number of ballot-papers received by him and of the number used at the poll, and that the numbers did not afford any means of identifying the voters.

His Honor admitted the papers.

His Honor rejected ballot-papers marked as follows :—

With a cross on the name of one candidate.

With a cross opposite the name of one candidate, and a horizontal line opposite the name of the other.

With one line meeting another at an angle but not crossing it, opposite the name of one candidate.

With a number on the back apparently that of the elector on the roll and apparently put there by the presiding officer and afterwards struck out by him, but still remaining visible.

Sir John Quick applied that the applications for and counterfoils to the postal votes held to be invalid, should be referred to a private scrutiny for the purpose of determining for whom they

H. C. OF A. 1904.

CHANTER v. BLACKWOOD. (No. 2).

were cast, and also for leave to bring evidence that the Justices of the Peace who attested such applications were in many cases agents and canvassers for the respondent.

GRIFFITH, C.J.—I think the whole scope of the Act precludes any inquiry into the manner in which any elector has exercised the franchise. The Act does not contain any express provision that voting shall be by ballot; but it is clearly the scope of the Act that there shall be a secret ballot. That is shown by a comparison of this Act with some, if not all, of the Statutes as to Parliamentary elections in the several States. Under some of these Acts a number is put upon the back of the ballot-paper, and under others the ballot-papers are taken out of a book which contains counterfoils, so that in the event of its becoming necessary to do so, it might be ascertained in which way the voter had voted. Those provisions have been objected to on the ground that they infringed against the secrecy of the ballot; and, when I find that in this Act all means of identifying votes which ought not to have been given are omitted, I can only come to the conclusion that any inquiry on the part of the Court with the view of discovering in which way any voter has voted, would be contrary to the intentions of the legislature. It is no part of my duty to express any opinion as to whether this is the best method of conducting an election. It is always open to the objection that it may in many cases lead to inconvenience. An election may be avoided, even although it is morally certain that all the votes wrongly given have been given against the candidate who has been declared elected, so that the result has not really been affected. But the other objection, that the secrecy of the ballot would be infringed, appears to have outweighed this objection. I must assume that the legislature thought that the possible disclosure of the way in which a voter voted was a greater evil than the other, and that their intention was that no such inquiry should be made. Therefore I am not justified in entering into any inquiry as to how these voters voted. In any case the mode suggested is, I think, impossible. For that reason I think I am bound to refuse the first application. As to the other application I do not think I am justified in granting it. It seems to involve a breach of the same principle of the

secrecy of the ballot. And, apart from that objection, I do not think I could draw any inference as to how a voter voted from the fact that the person who witnessed the signature of the voter to the application for a postal ballot-paper was a supporter of one candidate.

Of the votes reserved by the Deputy Registrar, *Griffith*, C.J., allowed 40 for the petitioner and 30 for the respondent, thus giving the respondent an apparent majority of 67 votes. But His Honor also decided that 91 votes of persons not entitled to vote had been received and counted, that 2 votes of persons entitled to vote had been wrongly excluded, and that a majority (12) of absentee votes in favour of the respondent had wrongly been excluded, making a total of 105 votes.

GRIFFITH, C.J.—I have now to determine what are the consequences under these circumstances. I think that in deciding this case I must apply what is called the Common Law of elections. This Court has held that the law sometimes called the Common Law of Parliament does not apply so as to give this Court jurisdiction to avoid an election by reason of a single illegal practice on the part of a candidate. But the Court did not deny that there is a Common Law of elections which is of general application in the case of municipal as well as Parliamentary elections. It is, after all, only a rule of common sense. The object of an election is to secure that the majority of electors shall choose the person they desire to be elected. The law to be applied is found in *Woodward* v. *Sarsons*, (1875) L.R., 10 C.P., 733, at p. 743. "We are of opinion that the true statement is that an election is to be declared void by the Common Law applicable to Parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real *electing* at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, *i.e.*, that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a free and fair opportunity of electing the candidate which the majority might prefer. This would certainly be so if a majority of the

H. C. OF A. 1904.

CHANTER v. BLACKWOOD. (No. 2).

electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a Returning Officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred. But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the Common Law of Parliament." Applying that principle to the present case, it appears that the petitioner had a majority of 67 votes, and, therefore, ought to have been declared elected by the Returning Officer. Through mistakes made in the counting the Returning Officer declared that the respondent was duly elected by a majority of 5. The petitioner then presented his petition, and claims the seat. It is clear that the respondent cannot say that he was himself duly elected, but he is entitled to say that the petitioner should not get the seat. He is now in the same position as if the petitioner had been declared elected, and he, the respondent, were petitioning against that return. The respondent has proved that, although the petitioner had a majority of 67, there were counted 91 votes of persons who had no right to vote, that 2 other persons, who were entitled to vote, lost their votes, and that the votes of a number of absentee voters must, through errors of the election officials, be rejected. Of these a majority of 12 wished to vote in favour of the respondent. In these circumstances can I say that the majority

of the electors may not have been prevented from exercising their free choice? Suppose that, instead of 91 persons voting who had no right to vote, 91 persons who had a right to vote had come and claimed to vote, and were not allowed to vote. Clearly those persons would have been prevented from exercising their right to vote, and the election must have been declared void. I cannot see that any other result can follow when a number of persons, sufficient to change the majority into a minority, if they all voted against the candidate having the majority, have wrongly been allowed to vote. I cannot enquire how they actually voted. It is clear that they may have voted for the respondent, in which case the petitioner's majority would be larger, or that they may have all voted for the petitioner, in which case the respondent would have been elected. But the numbers being as they are, it is impossible for me to say that the majority of the electors may not have been prevented from exercising their free choice.

In addition to those 91 votes, a majority of 12 absentee votes for the respondent have not been counted in consequence of a mistake of the officials. They would have reduced the majority for the petitioner to 55. Two other voters were deprived of their right to vote by the mistake of the Returning Officer. So that practically there are 93 votes to be taken as compared with 55. If it had been 56 instead of 93 the result would have been the same. That being so, I am bound to declare that the respondent was not duly elected and that the election is wholly void. I do so with regret, but I feel compelled to do so by the law as I understand it.

In my opinion up to Monday, 11th April, the respondent was in the position of an unsuccessful party. Since then he has been in the position of a successful party. I therefore give the petitioner the costs of and occasioned by the petition so far as the same relate to the claim by the petitioner that he had a majority of votes and ought to have been returned at the election, up to and inclusive of Monday. Each party will bear his own costs since that day.

Sir John Quick asked that costs should be on the higher scale.

H. C. OF A. 1904.

CHANTER v. BLACKWOOD. (No. 2).

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.

H.C. OF A. 1904.

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