[HIGH COURT OF AUSTRALIA.]

JOSEPH VARDON . . . . . PETITIONER;

AND

JAMES VINCENT O'LOGHLIN . . . RESPONDENT.

ON A REFERENCE BY THE SENATE OF THE COMMONWEALTH.

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SYDNEY, *Dec.* 17, 18, 20.

Griffith C.J., Barton, Isaacs and Higgins JJ.

The Constitution (63 & 64 *Vict. c.* 12), *secs.* 13, 15, 47—*Election of senators—Void as to return of one senator—Vacancy in Senate—Election of senator by State Parliament—Validity of election disputed—Reference to High Court—Disputed Elections and Qualifications Act* 1907 (*No.* 10 *of* 1907), *sec.* 2.

The Court of Disputed Returns having declared a periodical election of senators for the State of South Australia absolutely void as to the return of one senator, the Houses of Parliament of the State, sitting together, and assuming to act under sec. 15 of the Constitution, chose a senator to fill the vacancy.

On a petition to the Senate, removed into the High Court as the Court of Disputed Returns under sec. 2 of the *Disputed Elections and Qualifications Act* 1907:

Held, that the vacancy existing after the declaration by the Court of Disputed Returns was not a vacancy arising in the place of a senator before the expiration of his term of office within the meaning of sec. 15 of the Constitution, and, therefore, the choice or election of a senator by the State Parliament was null and void.

PETITION removed from the Senate into the Court under sec. 2 of the *Disputed Elections and Qualifications Act* 1907.

Joseph Vardon, the petitioner, was returned at the election of 1906 as one of the three senators elected to represent the State of South Australia, but on a petition presented to the Court of Disputed Returns the election of senators for that State was declared absolutely void in respect of his return. Thereupon the Houses of Parliament of the State, sitting together and assuming

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to act under the provisions of sec. 15 of the Constitution, chose James Vincent O'Loghlin, the respondent, to hold the place then vacant in the representation of the State in the Senate.

The petitioner then presented this petition to the Senate, asking that the choice or election by the State Houses of Parliament of the respondent to hold the place of senator for the State might be declared null and void, that it be declared that the respondent had not been duly chosen or elected as a senator, or to hold the place of a senator, and had no right or title to sit vote, or act as a senator, and that the seat of one senator for the State be declared vacant, with a prayer for costs against the respondent.

The matter was then referred to the Court under the Act No. 10 of 1907.

The facts having been fully stated in the report of the case of *The King* v. *The Governor of the State of South Australia* (1), it is not necessary to make further reference to them here.

Piper, for the petitioner. Sec. 15 of the Constitution has no application to the facts of this case. From the date of the declaration by the Court of Disputed Returns that Vardon's election was absolutely void, the position is the same as if he never had been elected. Any other construction would be contrary to the spirit of the Constitution, which requires that, except where expressly otherwise provided, the senators shall be chosen by popular election.

[GRIFFITH C.J.—That appears to be the dominant principle. If so it should not be defeated by a mere accident or mistake.]

Sec. 7 states the guiding principle, and there is nothing in the Constitution which modifies its effect to the extent of providing that senators should not be so chosen whenever a breach of duty by some electoral officer or some act of corruption on the part of a candidate invalidates the election. The words of sec. 15, naturally construed, are apt to meet the contingencies contemplated in secs. 19, 20 and 45. To make the words of sec. 15 fit the present case involves straining them to a meaning quite different from that in which they fit the sections mentioned. They all con-

(1) 4 C.L.R., 1497.

template the case of a senator with title ceasing to hold the office, whereas in the present case there was never any title. It is not a casual vacancy occurring before the expiration of a senator's term of office, to be temporarily filled as provided by sec. 15, but a normal vacancy occurring by rotation, which has not yet been filled. This construction is in accordance with the common law of elections as established by parliamentary practice. Ouster of a member for want of title is not merely effective as causing a cesser of possession by the member ousted, but as evidence that the member was never in the office. *Haynes on Election of Senators*, p. 60, cited in *Commonwealth Hansard*, 16th Oct. 1907, p. 4721.]

[GRIFFITH C.J.—The American authorities on the point, though not exactly parallel, suggest that, where a primary or a secondary mode of election is provided, the Courts have refused to allow the second or alternative method to be adopted until the first has been tried and has failed.

HIGGINS J. referred to *May, Law and Practice of Parliament*, 3rd ed., p. 453.]

To transfer the rights of the people to the Parliament would open the door to grave abuses. It might at times be in the interests of some local party, temporarily predominant, to contrive that an election should be invalidated.

Rolin, for the respondent. No doubt the primary mode of election of senators under the Constitution is by the people of the State, but sec. 15 plainly provides other methods, which to some extent deprive the people of their privilege, and the question is whether the present is a case coming within that section. By adopting the procedure under sec. 15 the direct popular choice is not destroyed, it is merely postponed. For the purpose of expedition, convenience, or economy the Constitution has provided that the people shall choose a senator through their representatives in Parliament. The section is really for the benefit of the people, to prevent their being disfranchised through accident or the fault of others.

[ISAACS J.—The last part of the section is most in your way, "until the election of a successor." Can that language be used with reference to a person whose election was bad from the beginning?]

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A senator *de facto* may have a successor, as well as a senator *de jure*. Vardon was *de facto* senator until his election was declared void. If there had been no petition within the time he would have still been there, however wrongly he was elected. The declaration by the Court did not make the election void from the beginning, but from the date of the declaration. Till then the election was valid.

[GRIFFITH C.J.—Yes, but only for certain purposes. He was a senator in the sense that nobody could impeach his acts as a senator while he sat.

HIGGINS J.—Does not sec. 15 only refer to changes in the personnel of the Senate taking place according to the normal course of things? Is there anything in the Constitution dealing with vacancies caused by an infringement of the law as to elections? Should it not be assumed that the Constitution deals only with cases in which its provisions have been observed?]

Possibly, but vacancies may arise through infringement of the law of election, and therefore, in providing for vacancies, the Constitution should be construed as having provided for vacancies so caused, just as for those caused by death. If Vardon's actions while in the Senate are treated as valid, he has filled the place, and has had a term of office, and his ceasing to be there causes a vacancy. [He referred to *May, Law and Practice of Parliament*, 11th ed., p. 631; *McDowell* v. *United States* (1).] The irregularity in the election did not create the vacancy, but the decision of the Court.

[BARTON J.—The Court found that there had been no election, that the original necessity to fill the place had not been fulfilled.]

Upon the construction contended for by the petitioner there is no provision in the Constitution for filling such a vacancy, but upon the other construction sec. 15 covers the case, and there is no necessity to strain sec. 13 so as to make it apply. The voidness intended by the Electoral Acts has no place in the Constitution at all, and cannot affect its construction.

The object of the Constitution is to have popular elections only at definite periods, not at odd times. It cannot have been intended that the expense of such an election should be incurred

(1) 159 U.S., 596.

for the election of a single member. An election *nunc pro tunc* would be in opposition to the spirit of the Constitution, would involve straining the words of sec. 13, and would derange the calculation of the statutory periods for senatorial office. Where a specific time is fixed by Statute for the election of officers, an election out of time will not satisfy the Statute: *Rochester, Mayor of* v. *The Queen* (1); *Bowman* v. *Blyth* (2); *In re Stafford, Coroner for* (3); *In re Delgado* (4); *Sutherland, Notes on the United States Constitution* (1904), p. 52, and cases cited.

[GRIFFITH C.J. referred to *The King* v. *Norwich, Mayor of* (5).

ISAACS J. referred to *The Queen* v. *Monmouth, Mayor of* (6); *The Queen* v. *Farquhar* (7).

HIGGINS J. referred to *The King* v. *Sparrow* (8).]

Piper in reply. If it is necessary to strain either sec. 13 or sec. 15, it should not be in the direction of cutting down the rights of the people. The respondent interprets sec. 13 literally so as to exclude a bye election, and then, to fit that construction, interprets sec. 15 in such a way as to put a strain upon every important word in it. The Constitution could not be expected to go into details as to the machinery of bye elections, but secs. 9, 12 and 21 are comprehensive enough to include them. If sec. 15 had been intended to cover all possible cases of election to fill vacancies, it would have said "whenever any vacancy occurs" without qualification. "Election" under the Constitution includes the whole proceeding by which the people choose representatives, from the issue of a writ until the full number are validly elected. [He referred to *The Dungarvan Case* (9).]

[GRIFFITH C.J. referred to *Rogers on Elections*, 13th ed., p. 241.]

It is immaterial at what time some parts of the election take place, provided that the process is begun in accordance with the Constitution. A supplementary writ should be issued under sec. 108 of the *Commonwealth Electoral Act* 1902. The duty to hold an election is the primary one; the requirement that it should be

(1) 7 El. & Bl., 910; El. B. & E., 1024.
(2) 7 El. & Bl., 26, at p. 47.
(3) 2 Russ., 475, at p. 483.
(4) 140 U.S., 586.
(5) 1 B. & Ad., 310.
(6) L.R. 5 Q.B., 251.
(7) L.R. 9 Q.B., 258.
(8) 2 Stra., 1123.
(9) 2 P. R. & D., 300.

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held at a particular time is subsidiary, and should not be used as a pretext to excuse omission to perform the main duty when the prescribed time has passed. [He referred to *The Queen* v. *Justices of County of London and London County Council* (1).]

Cur. adv. vult.

The judgment of GRIFFITH C.J., BARTON J., and HIGGINS J., was read by

GRIFFITH C.J. Sec. 7 of the Constitution, which introduces Part II. dealing with the Senate, is as follows :—

"The Senate shall be composed of senators from each State, directly chosen by the people of the State, voting, until Parliament otherwise provides, as one electorate."

This is the dominant provision. Those which follow, and which include provisions allowing the choice of a senator to be made in certain cases otherwise than by the people of the State, are ancillary.

At the election of senators appointed to be held in December 1906, three persons were returned as duly elected for the State of South Australia. Subsequently in May 1907 it was determined by the Court of Disputed Returns that the election of one of the persons so chosen was void. The question thereupon arose how the vacant place was to be filled.

Sec. 15 provides as follows :—" If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens."

The Houses of Parliament of South Australia, assuming and intending to act under the authority of this section, chose the respondent to fill the vacant place. The petitioner claims that they had no power to do so, but that the vacancy must be filled by a popular election. He maintains that sec. 15 is applicable only to cases in which a senator holding his place *de jure* as well as *de facto* vacates his seat by death, resignation (sec. 19), absence

(1) (1893) 2 Q.B., 476.

without leave (sec. 20), or disqualification (sec. 45), and he appeals to what has been called the law of Parliament, under which the resignation of a person who had been returned as elected, but whose election was liable to be avoided, was not allowed to prejudice the rights of another candidate who claimed to have been elected. It was answered that the so-called law of Parliament had no application if the seat were not claimed by another. Nor was there any reason for its application in such a case, since a new election was equally necessary whether the first election was void or valid. But in either case the election was by the same body of electors. The petitioner contends that the same rule should be applied in order to preserve the rights of the people of the State to make a direct choice of the full number of senators. Reference was also made to the *Dungarvan Case* (1) (cited in *Rogers on Elections*, Part II., 16th ed., p. 263), in which it was laid down—not, it is true, by a Court of law—that an election which has been set aside by a competent authority as null and void is considered in law as no election, since there has never been a valid return according to the exigency of the first writ; and that all the proceedings subsequent to the issue of that writ until a valid return has been made according to its exigency constitute in law but one election, because the original vacancy remains until lawfully filled according to the exigency of the first writ. The actual question for decision in the *Dungarvan Case* (1), was whether the whole proceedings should be regarded as one election for the purpose of the law relating to disqualification created by bribery committed at "the election."

This view appears to have been accepted by the Parliament when they enacted sec. 108 of the *Commonwealth Electoral Act* 1902, which provides that:—"Whenever an election wholly or partially fails a new writ shall forthwith be issued for a supplementary election." If this section is contrary to the Constitution it has, of course, no validity. But, if the rule of the *Dungarvan Case* (1) be adopted, sec. 108 merely provides the machinery for giving effect to a right created by the Constitution itself.

The behest contained in sec. 7 may fail in effect in either of three ways. It may happen (1) that no election is held at all;

(1) 2 P.R. & D., 300.

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(2) that an election is held in fact, but that a sufficient number of senators are not elected; (3) that the full number are returned as elected, but that the election of some or all of them is invalid. In the last case the return is regarded *ex necessitate* as valid for some purposes unless and until it is successfully impeached. Thus the proceedings of the Senate as a House of Parliament are not invalidated by the presence of a senator without title. But the application of this rule is co-extensive with the reason for it. It has no application as between the sitting senator and any other claimant for the place which he has taken, or as between him and the electors, by whom he was not in fact chosen. The question for our decision is whether, for the purpose of determining how the vacancy declared by the Court of Disputed Returns is to be filled, the choice, which has been declared by that Court to be invalid, is to be regarded as no choice at all, *i.e.*, as a failure to choose, or as a choice which is valid for all purposes until declared invalid, so that the same consequences follow as if the first election had been valid.

It is admitted that in some cases the adjudication of the Court of Disputed Returns must have a retrospective effect. If, for instance, a person who has been returned *de facto*, and against whose return a petition is presented claiming (as in the present case) that another person was duly elected, resigns his place under sec. 19, whether before or after presentation of the petition, the Court must proceed to hear it, and if the Court determines that the other person was duly elected that person will take his place in the Senate, and his term of service will run from the same period as if he had been originally returned. If in the meantime the Houses of Parliament of the State, acting upon his resignation, have assumed to choose a senator under sec. 15, it is conceded that that choice would be superseded by the adjudication. That is to say, all that happened consequent upon the election which is declared void would be disregarded as if it had never happened. The reason is that, as the election itself was void, nothing can be founded upon it, or upon any act of the person who wrongly assumed to act as a senator. The circumstance that the seat is claimed by another is an accident, and not the governing consideration. The election is either valid or

invalid. If invalid, the reason of the invalidity is not material so far as regards its consequences. We think it follows that, upon the avoidance of the election itself by the Court of Disputed Returns, the case is to be treated for all purposes, so far as regards the mode of filling the vacancy, as if the first election had never been completed, unless there is something in the Constitution to lead to a contrary conclusion. This view is in accordance with the general rule as to the effect of an adjudication of a competent tribunal on a question of status. If in a suit of nullity of marriage the marriage is declared void, the effect of the judgment is retrospective, and the children of the marriage are illegitimate. So, a declaration of legitimacy in a suit for that purpose, in England, is retrospective and takes effect from the birth of the child. The operation of this rule can only be excluded by the necessity of the case or by express legislation, as in the well known instance of the validation of certain transactions entered into by debtors after acts of bankruptcy, or transactions declared void on the ground of fraud.

It follows that the result of a declaration that the election of a senator is void is the same as if he had not been originally returned as elected, and that the three cases enumerated are in principle identical. What then does the Constitution prescribe in such a case? It prescribes (sec. 13) that the Governor of a State may cause writs to be issued for elections of senators for the State. *Primâ facie*, this is to be done whenever the necessity arises. Sec. 9 empowers the State Parliament to make laws for determining times and places of elections of senators for the State. In the absence of any express law the days of nomination and polling must be fixed by the Governor in the writ. The Constitution does not make any express provision for such a case as a failure to issue a writ at the prescribed time. If, however, a writ were not issued at the prescribed time, or if, a writ having been issued, no nominations were received, it would appear to follow of necessity that a writ, or a second writ, as the case may be, should be issued later, for otherwise the primary object of the Constitution in this regard—to secure the representation of the States in the Senate—would be frustrated (see *per* Lord *Tenterden*

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C.J. in *In re Stafford, Coroner for* (1)). In such a case the provisions of sec. 15 of the Constitution have no application, for there was no senator whose place could become vacant. Since then, in some cases, the issue of a writ or a second writ is necessary, and therefore authorized, there is no reason why it should not be held to be authorized in all cases of necessity. As pointed out by *Parke* J. in *R.* v. *Mayor of Norwich* (2) the same construction must be given to the Statute whether the failure to elect extends to the whole number to be elected or to some of them only.

But it is said that the context of the Constitution excludes this construction.

Sec. 13 was relied on as showing that the term of service of an elected senator must be counted from the first of January following the day of his election. This, it is said, would lead to confusion, if a bye election could be held after the lapse of perhaps a year or more from the day originally appointed. It is plain, however, that sec. 13 was framed *alio intuitu, i.e.*, for the purpose of fixing the term of service of senators elected in ordinary and regular rotation. The term "election" in that section does not mean the day of nomination or the polling day alone, but comprises the whole proceedings from the issue of the writ to the valid return. And the election spoken of is the periodical election prescribed to be held in the year at the expiration of which the places of elected senators become vacant. The words "the first day of January following the day of his election" in this view mean the day on which he was elected during that election. For the purpose of determining his term of service any accidental delay before that election is validly completed is quite immaterial. This section therefore does not stand in the way of the petitioner.

We pass to the arguments founded on sec. 15. Every system of election of members of any collective body for a fixed term is liable to have the regularity of rotation interrupted by accidental circumstances, such as the death or resignation of a member or his disqualification after election. Every system accordingly makes provision for such emergencies. Secs. 19, 20, and 45 deal

(1) 2 Russ., 475, at p. 483.

(2) 1 B. & Ad., 310, at p. 317.

with the events of resignation and disqualification by matter subsequent. It being then necessary, or at least desirable, to make express provision in the Constitution for filling vacancies so caused, sec. 15 was introduced, evidently as part of a complete scheme intended to secure a constant succession of senators for every State without undue multiplication of popular elections. On its face this section is, primarily at any rate, intended to deal with things occurring in the ordinary course of human events, and there is, *primâ facie*, nothing to suggest that it was intended to apply to such abnormal events as a failure to elect a senator or senators. Its language is all consistent with this view. The condition on which it comes into operation is that "the place of a senator becomes vacant before the expiration of his term of service." This assumes a previous election and the existence of a senator who has a "term of service." Those words obviously relate to sec. 13, which prescribes the term of service of senators chosen by the people, although they would, no doubt, also cover the case of a senator chosen by the Houses of Parliament in the place of such a senator. But if there is no senator who has a term of service, the section literally read does not come into operation at all. It was contended that, since the ousted senator had *de facto* a place in the Senate, that place could become vacant. That is, no doubt, true in one sense, but it appears to be irrelevant to the question whether he was a senator having a term of service.

It was further contended that the second paragraph of sec. 15, which is as follows:—"At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term," shows an intention that there should not be any bye elections for the Senate. It was no doubt intended to avoid them in the case specified. There was, however, nothing to require the polling for a senator to be held on the same day as the polling for members of the House of Representatives. We do not think that this general indication of a desire to avoid unnecessary bye elections is sufficient to control the plain meaning of the other

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provisions of the Constitution or to prevent effect from being given to the dominant provision of sec. 7, that the senators shall be directly chosen by the people of the State.

For these reasons we are of opinion that the Houses of Parliament had no power to choose a senator in the events that happened, and that the choice of the respondent was void. Sec. 108 of the *Commonwealth Electoral Act* 1902 affords the Governor sufficient authority, if any express authority be necessary, for the issue of a supplementary writ.

ISAACS J. read the following judgment.

I entirely concur with the judgment read by the learned Chief Justice. But as the legality of the action of the Parliament of South Australia is under consideration, I desire to state my reasons separately.

The petition states that the election of Mr. Vardon was declared by the Court of Disputed Returns to be absolutely void. In this case it must be taken that the declaration meant that the election was always void in law—a mere unsuccessful attempt to elect—and not that it was a good election until the decision, and only avoided by the declaration.

Taking that as a starting point, the question is whether the only condition under which sec. 15 of the Constitution can operate existed in this case. In other words did the declaration, that the election was void in respect of Mr. Vardon, give rise to the situation contemplated by the opening words of sec. 15, namely, that "the place of a senator becomes vacant before the expiration of his time of service."

Sec. 1 of the Constitution vests the legislative power of the Commonwealth in the Federal Parliament which is to consist of the Sovereign, a Senate and a House of Representatives.

Sec. 7 declares that "the Senate shall be comprised of senators for each State directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate."

Sec. 24 in like manner declares that "the House of Representatives shall be comprised of members directly chosen by the people of the Commonwealth," &c.

The requirement in each case that members of the Parliament

shall be "directly chosen by the people" is more than a mere direction, more even than a simple mandate as to the mode of election; it describes the composition of the Houses themselves, so as to express the essential nature of these branches of the Parliament. Nothing could be more fundamental than the directly elective character of the two Houses.

Passing to sec. 13, the Constitution assumes the Senate is fully constituted according to law, and accordingly provides for rotation of senators by means of two classes of senators whose places are to become vacant at different periods so as to maintain the continuity of that House. It provides in the second paragraph as follows: "The election to fill vacant places shall be made in the year at the expiration of which the places are to become vacant." The recent constitutional amendment of sec. 13 does not affect this case.

I shall hereafter allude to an argument for the respondent Mr. O'Loghlin based upon the words just quoted, but, for the present, I wish to emphasize the fact that this paragraph gives a direction regarding the filling of vacant places *at* the expiration of the term. In other words, senatorial succession upon the normal ending of the term of service of a senator is provided for. That necessarily connotes a valid election of the retiring senator to begin with, and the undisturbed fulfilment of his service.

Then comes sec. 15 which, as I read it, is a provision in the event of the abnormal ending of the same term of service, that is, the term of service of a senator lawfully elected. It begins with the words already quoted:—"If the place of a senator becomes vacant *before* the expiration of his term of service," &c.

That is clearly dealing with the same senators, the same places, and the same terms of service as are already dealt with in sec. 13, but providing for the mode of filling the places in case the vacancy takes place *before* instead of *at the end of* the term. That is the natural and ordinary construction to which the words of the section lend themselves. If this be their true meaning, the section does not include a case like the present because, by the decision of the Court of Disputed Returns, Mr. Vardon was declared not to have been elected, and from the moment of that decision he must be

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considered in law never to have been a senator, never to have had a place, never to have had a term of service.

The validity of his public acts as a senator prior to the declaration is, of course, unaffected.

If then the effect of the declaration be as I have stated, sec. 15 never came into operation, and the action of the Parliament of South Australia was not authorized, and the prayer of the petition should be granted. It is, however, contended that sec. 15 does apply to the case for two reasons. The first is that Mr. Vardon was at all events *de facto* a senator, and had *de facto* a place and a term of service. The true answer is that, although it was honestly and reasonably, but, as it has since appeared, erroneously believed he was a senator, and in such belief he so acted, and occupied a place, and served for a time, yet that is not what the Constitution contemplates. It assumes legality of action, and when it speaks of a senator, it does not mean one who is already ascertained not to have been by law a senator.

Sec. 15 can only operate after the vacancy has occurred; and in this case that must be after the decision, and consequently after Mr. Vardon was removed as never having been legally elected. But in those circumstances how can the section intend to include him as a former senator?

Moreover sec. 15 refers to the election of a *successor* to the senator whose place becomes vacant. It would be incongruous to speak of a successor to a person who is declared by law to have been at all times improperly exercising senatorial functions. The word "successor" recognizes the rightfulness of the predecessor's occupancy of the place.

The second reason pressed for the application of sec. 15 is that the necessary construction of sec. 13 compels it.

It is said that the second paragraph of sec. 13 already quoted could not be complied with in view of such circumstances as have arisen here, with the result that no election of a third senator for South Australia could take place unless the means afforded by sec. 15 were resorted to.

But apart from the objections already stated to the inclusion of such a case as the present in sec. 15, the argument fails in assuming that the second paragraph of sec. 13 prohibits an election taking

place after the expiration of the year. Such a deferred election might not strictly follow the direction in sec. 13 of the Constitution and, if so, would be opposed to the policy of preserving the continuity of complete State representation in the Senate by having new senators ready to take the place of retiring senators immediately their terms expire. But it by no means follows that because the minor benefit—continuity—is lost, the greater object —complete direct representation—is impossible.

It might as well be contended from the 12th section that, if by some mischance the State Governor were to omit to issue writs within 10 days of the proclamation of dissolution of the Senate, all right to State representation would be forfeited.

Mr. Justice *Story* in *Prigg* v. *Pennsylvania* (1) said of the American Constitution :—" Perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

And if, as I conceive, the same safe rule should be applied in interpreting our own Constitution, then the provisions of secs. 7, 9, and 12 are ample in themselves to provide by direct election for the filling of places of senators retiring at the expiration of their term, notwithstanding any failure to strictly comply with the second paragraph of sec. 13.

On the whole, therefore, it appears to me that the constitutional position, so far as it is material to the present case, may be thus stated. The only *title* to a place and to a term of service is by direct election by the people. If such a title has been once lawfully created for the constitutional term, then, if the senator elected runs his course of service regularly, sec. 13 makes normal provision for the period of election of his successor; if, however, his term of service ends abruptly, as by death, resignation, or disqualification, sec. 15 applies. In that event the State Parliament or the State Governor in Council as the case may be does not elect a *successor*,—there is created no new place and no new term; there is merely the nomination of a temporary occupant of the place

(1) 16 Pet., 539, at p. 610.

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already granted for the constitutional term by the people to the late senator, and the new occupant so chosen holds the place, not as a successor, but rather as a substitute, and for no definite period. His occupancy ends, of course, at latest when the term ends; but it may end sooner, that is, when at the next general election of the House of Representatives or at the next election of the senators for the State, the people re-grant the place definitely for the remainder of the original term to a true successor of the original senator.

Cases might be imagined which, upon the construction I have placed on the 15th section, would give rise to considerable inconvenience and expense, and so lend weight to the respondent's contention—as if three several petitions were presented against the three senators for a State, the decisions being given at varying dates, and requiring separate intervening elections. But such instances, though conceivable, are not likely to arise, and the truth is that sec. 15 of the Constitution was not framed with the object of meeting numerous instances of irregular Senate elections, but of providing for possible but rare contingencies of the abnormal termination of the service of senators; so rare that departures from the fundamental principle of representation through popular election would be really inappreciable because infrequent and possibly of short duration.

The respondent's argument, on the contrary, though not without considerable force, would yet lead to a serious inroad upon the most vital of all the principles upon which the Federal system of Parliamentary representation rests. Such a construction as he contends for is, in my opinion, unsustained by the true reading of the Constitution, and consequently I think the petition is well founded, and a declaration should be made accordingly.

Election of the respondent by the Houses of Parliament of the State of South Australia declared absolutely void.

Solicitors, for the petitioner, *Bakewell, Stow & Piper,* Adelaide; and *Minter, Simpson & Co.,* Sydney.

Solicitors, for the respondent, *Sly & Russell,* Sydney.

C. A. W.