Solicitors, for the appellants, *Hedderwick, Fookes & Alston.*

Solicitor, for the respondent, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.

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MELBOURNE STEAMSHIP CO. LTD. v. MOOREHEAD.

[HIGH COURT OF AUSTRALIA.]

SMITH AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

OLDHAM (CHIEF ELECTORAL OFFICER FOR THE COMMONWEALTH) . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *Oct.* 8, 9.

Griffith C.J., Barton and Isaacs JJ.

Parliamentary Election (Commonwealth)—Political article in newspaper during election—Signature of author—Validity of Commonwealth legislation—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 10, 51 (*xxxvi.*)—*Commonwealth Electoral Act* 1902-1911 (*No.* 19 *of* 1902—*No.* 17 *of* 1911), *sec.* 181AA.

The Commonwealth Parliament has power under the Constitution to make laws regulating federal parliamentary elections, and, therefore, sec. 181AA of the *Commonwealth Electoral Act* 1902-1911 is within the powers of the Commonwealth Parliament to enact.

Decision of Court of Petty Sessions of Victoria affirmed.

APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Melbourne on 27th June 1912 an information was heard whereby Ryton Campbell Oldham, Chief Electoral Officer for the Commonwealth, charged that Robert Murray Smith, Roderick Murchison, Edward Fancourt Mitchell, Edward Fanning, Lauchlan Charles Mackinnon and William George Lucas Spowers, the editors of *The Argus* newspaper, on 31st May 1912, did, contrary to the *Commonwealth Electoral Act* 1902-1911, after the issue, and before the return, of

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a writ for the election of a member of the House of Representatives for the Division of Werriwa, permit in *The Argus* the publication of an unsigned article commenting upon certain candidates offering themselves at such election and upon certain political parties. The writ in question was issued on 6th May 1912, and its return was announced to the House of Representatives on 19th June 1912. The only defence taken was that section 181AA of the *Commonwealth Electoral Act* 1902-1911 was unconstitutional.

The Police Magistrate before whom the information was heard having convicted the defendants and fined each of them £1, they appealed to the High Court by way of order to review, on the ground that sec. 181AA (2) of the *Commonwealth Electoral Act* 1902-1911 is beyond the legislative power of the Parliament of the Commonwealth.

Mitchell K.C. and *Irvine* K.C. (with them *Duffy* K.C. and *McArthur* K.C.), for the appellants. The power to legislate as to Commonwealth elections is contained in secs. 10 and 51 (xxxvi.) of the Constitution. That power must be confined to legislation as to the conduct and control of elections, but sec. 181AA relates not to the conduct and control of elections but to the conduct and control of newspapers. The conduct and control of newspapers are within the reserved powers of the States. Sec. 180 is on a different footing. Its purpose is to identify the person who is responsible for the publication of the particular matter so that he may be made liable for misrepresentations. Such a provision is unnecessary in the case of newspapers. The power intended to be conferred on the Commonwealth Parliament is similar to that conferred by the Victorian *Constitution Act*, sec. xxvii., viz., a power to legislate for "the orderly effective and impartial conduct" of elections. [They referred to *Lord Halsbury's Laws of England*, vol. XII., p. 135.] The object of sec. 188AA is to control the means by which the electors may inform their minds as to which of the candidates they shall vote for. If the power is wide enough to cover sec. 188AA, then a similar section without the limit as to time would be within the power. The right of newspapers to refuse to disclose the names of

writers of articles is recognized in the Courts of law with regard to interrogatories. If the means by which electors are informed as to the candidate for whom they should vote may be controlled by the Commonwealth Parliament, the use of these means may be prohibited altogether. The object is to get the opinions of the electors properly recorded without fraud, undue influence or violence. It is of the essence of representative government that the electors should themselves be the judges of the means by which they form their opinions, and a power to regulate and control elections cannot extend to the regulation of the channels through which the opinions of the electors are formed. Legislation which goes beyond securing the complete free collection of the opinions of the people and which seeks to limit the materials from which those opinions are derived is not legislation as to elections. Fraud stands on a different footing. It is a wrong in itself and immediately affects the conduct of an election. If sec. 181AA is within the power, the power extends to any time and to all forms of communicating information or opinions as to political matters. The power is a limited one, and the only question is—Where is the limit? A State Parliament could pass a law requiring all newspaper articles to be signed, and, if such a law existed, the Commonwealth Parliament could not enact that between the issue and return of a writ for a federal election articles dealing with political matters need not be signed.

Weigall K.C. (with him *Latham*), for the respondent, was not called upon.

GRIFFITH C.J. Notwithstanding the very careful and able argument of Mr. *Mitchell* and Mr. *Irvine*, I am unable to entertain any doubt in this case. The question is whether sec. 181AA of the *Commonwealth Electoral Act*, which became law last year, is within the powers of the Commonwealth Parliament. The section provides that—"(1) On and after the date of issue and before the return of any writ for the election of a member for the Senate, or for the House of Representatives, or for the taking of any Referendum vote, every article, report, letter, or other matter commenting upon any candidate or political party, or the

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issues being submitted to the electors, printed and published in any newspaper, circular, pamphlet, or 'dodger,' shall be signed by the author and authors, giving his or their true name and address or names and addresses at the end of the said article, report, letter, or other matter." The second paragraph imposes a penalty on newspaper proprietors who permit a breach of this provision.

It is contended that this enactment is beyond the power of the Federal Parliament. It is not disputed that that Parliament has power to make laws for the regulation of federal elections. In my opinion that power is an exclusive power. The matter is one in which the States as such have no concern. Perhaps, "regulation of elections" is an inexact term. What is really meant is regulation of the conduct of persons with regard to elections. The main object of laws for that purpose is, I suppose, to secure freedom of choice to the electors. Incidental to the freedom of choice is the prevention of, amongst other things, intimidation and undue influence. It has been not uncommon, for the last half century at least, to make provision in electoral laws requiring advertisements, pamphlets and other election literature to bear the name of the printer and of the person by whose authority it is issued. Such a provision is to be found in sec. 180 of this Act, which is not in an unusual form. We are not concerned, of course, with the motives of the legislation, or with its wisdom, but only with the power of Parliament to enact it. It is a notorious fact that many persons rely upon others for their guidance, especially in forming their opinions. It is obvious, therefore, that the freedom of choice of the electors at elections may be influenced by the weight attributed by the electors to printed articles, which weight may be greater or less than would be attributed to those articles if the electors knew the real authors. It was contended that the electors should be allowed to form their own opinions from the abstract arguments addressed to them, irrespective of the persons by whom those arguments are put forward. But it is notorious, again, that many electors are unable to do so, and rely upon authority; and they may be less likely to be misled or unduly influenced if they know the authority upon which they are asked to rely. Parliament may, therefore, think that no one should be allowed by concealing his name to exercise a greater influence

than he could command if his personality were known. It is impossible to say that an enactment to that effect is not an enactment regulating the conduct of persons in regard to elections. Newspapers have in this respect, just as they have under the law of libel, no greater privileges than ordinary individuals.

For these reasons I think that the section attacked is within the power of the Commonwealth Parliament to enact, and that this appeal must be dismissed.

BARTON J. The enactment brought into question in this case is contained in sec. 181AA (2) of the *Commonwealth Electoral Act*. As that sub-section can be more clearly understood in connection with the first sub-section, I will read both :—[His Honor read the sub-sections and continued :]

It is under sub-sec. 2 that the proprietors of the *Argus*, a daily newspaper in Melbourne, have been fined for the publication of articles not signed as the enactment requires, commenting on an election to the House of Representatives for the district of Werriwa. The comments were in respect of the candidates and the political parties engaged in the election, and the issues submitted to the electors. It is objected that this legislation is not within the powers conferred upon the Commonwealth Parliament by the Constitution. What are those powers ? First, there is sec. 10 of the Constitution. Then, sec. 51 gives power to the Federal Parliament to make laws for the peace order and good government of the Commonwealth with respect to—" (xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides." Turning to sec. 31 of the Constitution, it provides that " until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives." No power was given to any State to make laws with regard to federal elections, but existing State laws as to State elections were made applicable to federal elections during the time which necessarily intervened before the Federal Parliament could legislate on the subject. That is all.

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Since the Federal Parliament has legislated upon the subject its legislation relating to elections has displaced that of the States, and its power to pass such legislation is exclusive, because no State Parliament had under its own Constitution power to legislate as to federal elections. Parliament has "otherwise" provided, and the only authority that can legislate upon the subject is the Parliament of the Commonwealth. That being so, it becomes essential to inquire what is the meaning in sec. 31 of the Constitution of the words "relating to elections." Do they mean the conduct of elections in its official aspect only? Clearly that would be too narrow a construction for the term, and need not be further considered. Do they mean, in addition to the conduct of elections in that aspect, their conduct in respect of the prevention and punishment of misconduct of one kind or another in connection with elections? They must include those particulars, otherwise the elections of the Commonwealth could not be safeguarded by Statute with respect to such matters as bribery, treating, undue influence and other matters which had been the common subject of electoral legislation before the Commonwealth was established. Those being admitted subjects of legislation, the further question arises whether this statutory provision now challenged is a law relating to elections to the Federal Parliament. It certainly is a law dealing with the conduct of citizens as affecting elections. It may be pointed out that, if the publication of articles and comments dealing with the issues and the candidates at federal elections cannot be made the subject of legislation by the Commonwealth Parliament under some one or more of its powers, it cannot be made the subject of legislation at all, unless legislation upon that subject could be made by the States. But that would mean that the States individually would have power to make laws, necessarily diverse, so regulating the conduct of their citizens (who are at the same time citizens of the Commonwealth) as to influence the course of those elections according to the policy of the particular State. Surely the proposition that States have and the Commonwealth has not the power to deal with the conduct of citizens in respect of federal elections is too grotesque to be entertained. If then the Parliament of the Commonwealth cannot legislate upon a matter of

this sort there can be no legislation upon it at all. But that we cannot say, for the Constitution in the distribution of powers between Commonwealth and States embraces the whole range of legislative authority within the territorial limits of Australia. And as it is plain that no State can deal with the conduct of citizens of the Commonwealth in respect of federal elections, the power must reside in the Commonwealth. We are asked, however, to regard the enactment as dealing with the conduct of the press, a subject within the competence of State legislation. It certainly does deal with the conduct of the press, but in relation to federal elections only. It deals with it as the conduct of a body of citizens whose actions may, and often will, affect the result and issues of federal elections. No State has anything whatever to do with such a subject as that.

We are brought back then to this conclusion that, if there is to be any legislation upon a subject of this kind, there is no legislature in Australia other than the Parliament of the Commonwealth that can effectively legislate. Is it then to be said that there is no power to legislate at all? I have already pointed out the reason why that idea cannot be entertained. But, if it cannot be entertained, then there must be some authority having the power, and the only authority is the Parliament of the Commonwealth.

I need scarcely declare, after what I have already said, that I consider the section is in the strictest sense a law relating to elections, but I wish to point out that, if that were not so—if the connection were not direct, as I think it is,—the argument would not avail the appellants in this case, because the matter would then be covered by sec. 51 (xxxix.) of the Constitution, for it is clearly a matter incidental to the execution of a power vested in the Parliament.

On these grounds I think that the provision impeached is clearly within the Constitution and that the appeal must be dismissed.

ISAACS J. read the following judgment:—The validity of sec. 181AA, so far as its provisions affect the appellants, is contested on the ground that these provisions regulate the conduct of news-

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papers and not federal elections. In truth, they regulate the conduct of newspapers, but only in so far as it concerns federal elections. Control of the subject matter of federal elections would be meaningless unless it implied control of persons in relation to such elections.

Secs. 31 and 10 and sub-secs. (xxxvi.) and (xxxix.) of sec. 51 of the Constitution empower the Parliament to legislate with reference to parliamentary elections and all matters incidental. But, say the appellants, the challenged provisions are neither the direct object of the power nor matter incidental. The reason given is that the object and the only object of an election is to get a formal registration of the actual opinion of each elector, without regard to the way in which that opinion has been formed.

So far as concerns the mechanical process of election that is true enough; but to confine the power of the Parliament to a supervision of the mechanism is to neglect the vital principle behind it. The vote of every elector is a matter of concern to the whole Commonwealth, and all are interested in endeavouring to secure not merely that the vote shall be formally recorded in accordance with the opinion which the voter actually holds, free from intimidation, coercion and bribery, but that the voter shall not be led by misrepresentation or concealment of any material circumstance into forming and consequently registering a political judgment different from that which he would have formed and registered had he known the real circumstances.

So far from the latter consideration being foreign to the subject of election, it is of the first importance. For an opinion into which a man has been tricked or misled, even innocently, is a double wrong. It means not merely a loss to the side on which he would otherwise have cast the vote, but it also strengthens their opponents.

It is admitted that the Parliament can forbid and guard against fraudulent misrepresentation. It would shock the conscience to deny it. On what ground can so much be conceded, unless because it is an incidental power to protect the voters from intended deception?

But the public injury, so far as political results are concerned, is as great when the opinion of the electorate is warped by reck-

less, or even careless, misstatements, as when they are knowingly untrue; in each case the result is falsified, and therefore the mischief may be equally provided against if Parliament thinks fit. Even when nothing is conveyed but advice or opinion, the identity of the person proffering it, if not withheld, might for various reasons seriously affect its value and weight in the minds of the electors. The testimony of a witness in a Court of Justice might be differently appraised if his true personality were undisclosed, or if, on the other hand, his interest, his experience, and, possibly, his past career, were placed before the jury.

Not less important may be the personality of those who by the most extensive and effective means known to society disseminate in a great national controversy their assertions of facts, opinions, and advice, for the very purpose of influencing the result. We have here to consider the question of power merely, not expediency, and whether it be advantageous or not to enact this law, is beyond our province to discuss. It is, of course, conceded the Commonwealth Parliament has plenary power over federal elections. But plenary power is incapable of restraint; and it is a mere lip loyalty to principle, if, while acknowledging the doctrine, it be assiduously sought to defeat its application. The limits of plenary power end only with the subject matter in respect of which it may be exercised. If the purity and reality of elections be within the ambit of the power, if in the public interest the electors may be protected from the open assaults of force and threats and corruption, it is impossible to exclude the right also to guard them against the more insidious, and, in many respects, the more dangerous form of winning their assent by acts apparently fair and disinterested, but which may be so only on the surface.

If, then, there were nothing in the nature of precedent, the reason of the matter would be sufficient to sustain the enactment. But there is abundant precedent, and as the question arises on the construction of an Imperial Act—the Constitution—I confine myself to instances from Imperial legislation.

The *Corrupt and Illegal Practices Prevention Act* 1883, sec. 18, provides that " Every bill, placard, or poster having reference to an election shall bear upon the face thereof the name and

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address of the printer and publisher thereof," and the penalty for contravention is a fine not exceeding £100. That section was repeated in 1884 with reference to municipal elections (47 & 48 Vict. c. 70, sec. 14), and under its provisions arose the case of *Alcott* v. *Emden* (1). The Court of King's Bench Division held the appellant lawfully convicted in respect of a bill which he caused to be printed in August respecting the respondent, who, in July, was informally mentioned as, and was generally known to be, an intending candidate for the office of mayor in the following November. Lord *Alverstone* C.J. said:—"The real mischief intended to be struck at was publication without a sufficient indication as to who the real author was." He further held that even the time at which it was printed made it not wrong for the magistrate to hold it had reference to the election. The rest of the Court concurred. The nature of the penalty affixed is nothing to the point. The substantial consideration is that for the better securing a true election the disclosure of authorship was insisted on. Then in 1895 the *Corrupt and Illegal Practices Prevention Act* of that year (58 & 59 Vict. c. 40) added to the list of illegal practices. Any person who, or the directors of any body or association corporate which before or during a parliamentary election, and for the purpose of affecting the return of any candidate, makes or publishes any false statement of fact in relation to the personal character or conduct of the candidate, is guilty of an illegal practice (sec. 2). As to this it is stated in *Halsbury's Laws of England*, vol. XII., p. 299:—"The false statement of fact need not be libellous at common law, so long as it is a statement which is calculated to influence the electors." Belief on reasonable grounds is exculpation. By sec. 3 an injunction may be granted when such a false statement is made.

Again in 1908 an Act was passed to prevent the disturbance of public meetings. This Act makes it an offence to try to break up a lawful public meeting and fixes a heavy penalty. But it makes this special provision, that if the offence is committed at a political meeting held in any parliamentary constituency between the date of the issue of the writ and the date of the return, it is an illegal practice within the meaning of the *Corrupt*

(1) 68 J.P., 434.

and Illegal Practices Prevention Act 1883. It therefore seems quite clear the Imperial legislature did not hesitate to connect all this class of legislation with elections, and to treat it as a legitimate means of fencing round the conduct of elections with desirable safeguards for the better exercise by the people of their right of parliamentary representation.

It is inconceivable that in Australia there exists no legislative authority competent to pass such a law. I said once before of another Statute (*R.* v. *Barger* (1)):—"The power to pass such an Act must reside somewhere." Recently in the *Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (2) I quoted the words of Lord *Loreburn* L.C. in *Attorney-General for Ontario* v. *Attorney-General for Canada* (3), laying down the same test. I will not now repeat those words; but in effect the Judicial Committee held that in a completely self-governing Constitution it is to be taken for granted a power naturally appertaining to the self-government conferred is contained somewhere within it.

If then, the State does not possess the power, the Commonwealth must.

The subject matter of the present enactment is transparently beyond the competency of the State to control. It was the Constitution itself, and not the State Parliament, that applied even as an interim provision the State laws to federal elections. So it necessarily falls within the scope of the Commonwealth legislative authorities to regulate those elections.

I would only add if the appellants' argument were accepted as to the limited area upon which Parliament could legislate with respect to elections, a vast number of important provisions would have to disappear in company with the challenged section.

I quite agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellants, *Blake & Riggall.*

Solicitor, for the respondent, *C. Powers,* Crown Solicitor for the Commonwealth.

B. L.

(1) 6 C.L.R., 41, at p. 101. (2) 15 C.L.R., 182, at p. 214.
(3) (1912) A.C., 571, at pp. 583, 584.