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THE COMMONWEALTH v. BRISBANE MILLING CO. LTD.

Powers J.

It was contended that this Court had power in its original jurisdiction to grant the new trial, but I am not satisfied that such a power has been granted by the Constitution or that it can be granted by Parliament as original jurisdiction. It appears to have been granted by Parliament as part of the appellate jurisdiction, and I think rightly so.

I hold that this Court has jurisdiction to entertain and grant the appeal and to order a new trial in this case.

Appeal dismissed with costs.

Solicitor for the appellants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the respondents, *Mark Mitchell & Forsyth.*

B. L.

Cons *Amalgamated Metals Foundry & Shipwrights Union, Re* 4 FCR 319

Appl *Davison* v *Electoral Commissioner of New South Wales* (1992) 74 LGRA 246

Cons *Fenlon* v *Radke* [1996] 2 QdR 157

Cons *King* v *Electoral Comr* (1998) 72 SASR 172

Cons *Featherston* v *Tully* (2002) 83 SASR 302

Appl *Forrest, Application of* (1991) 74 LGRA 141

Foll *Wasaga* v *Tahal* (1991) 33 FCR 438

Dist *Forrest, Application of* [1993] 1 QdR 478

Cons *Liston* v *Davies* (1937) 57 CLR 424

[HIGH COURT OF AUSTRALIA.]

BRIDGE . . . . . APPELLANT;

AND

BOWEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 2, 3, 4; *June* 13.

Griffith C.J., Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Local Government—Alderman—Ouster—Election—Personation—"Unduly elected"—Onus of proof—Sydney Corporation Act 1902 (*N.S.W.*) (*No.* 35 *of* 1902), *secs.* 21, 40, 54, 56.

Sec. 21 of the *Sydney Corporation Act* 1902 (*N.S.W.*) provides that "There shall be two aldermen for each ward, who shall be elected by the persons on the roll for such ward." Sec. 40 provides that (1 and 2) before voting at an election a person claiming to vote shall make and subscribe before the presiding officer a declaration to the effect that he is entitled to vote in respect of the particular name which appears upon the roll, that (3) no question

shall be put to any person applying to vote other than the question whether he is the person whose name appears upon the roll, that (4) every person wilfully making a false answer to such question or making a false declaration shall be deemed to be guilty of a misdemeanour, and that (5) no person shall be allowed to vote unless he makes the required declaration and (if asked) answers the question satisfactorily, "(6) Provided always that no person shall be excluded from voting at an election unless it appears to the presiding officer that the person claiming to vote is not the person whose name appears on the roll, or that he has previously voted at the same election within the same ward, or otherwise contrary to this Act." Sec. 54 provides that "Any person . . . who votes or attempts to vote in or for any ward, in respect of which he is not qualified, or who personates or attempts to personate any other person for the purpose of voting at any such election, shall be guilty of a misdemeanour, and be punished accordingly." Sec. 56 provides that "(1) If it appears upon affidavit that any person declared to be elected . . . an alderman has been unduly elected . . . the Supreme Court, or any Judge thereof, may grant a rule or order calling upon such person to show cause to the Court why he should not be ousted of the said office. (2) Upon the return of such rule or order, if it appears to the Court that such person so elected . . . was unduly elected . . . the Court may make such rule or order absolute" &c.

Held, by *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that under the *Sydney Corporation Act* 1902 a person declared to have been elected as an alderman does not appear to be "unduly elected" within the meaning of sec. 56 of the Act if nothing more appears than that votes given by personators have been accepted and counted and that the number of those votes is greater than the difference between the number of votes cast for that person and the number of votes cast for the unsuccessful candidate declared to have received the next highest number of votes.

Observations by *Griffith* C.J. as to the effect of the decision.

Decision of the Supreme Court of New South Wales: *Ex parte Bowen*, 16 S.R. (N.S.W.), 49, reversed.

APPEAL from the Supreme Court of New South Wales.

On the application of Samuel Bowen an order *nisi* was granted by the Supreme Court calling upon Clarence Walter Bridge to show cause why he should not be ousted of the office of alderman for the Denison Ward in the City of Sydney, on the ground that he was not duly elected. The order *nisi* was made absolute by the Full Court: *Ex parte Bowen* (1).

From that decision Bridge, by special leave, appealed to the High Court.

(1) 16 S.R. (N.S.W.), 49.

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The material facts and the arguments appear in the judgments hereunder.

The appeal was first argued on 19th April before *Griffith* C.J. and *Barton*, *Isaacs*, *Gavan Duffy* and *Rich* JJ., and by direction was now re-argued before a Full Bench.

Flannery and *Windeyer*, for the appellant.

Knox K.C. (with him *Armstrong*), for the respondent.

[During argument reference was made to *Woodward* v. *Sarsons* (1); *R.* v. *Jefferson* (2); *West Belfast Case* (3); *Islington Case* (4); *Chanter* v. *Blackwood* [*No.* 2] (5); *Pryce* v. *Belcher* (6); *North Durham Case* (7); *Blundell* v. *Vardon* (8); *In re Belfast Municipal Election*; *Gribbin* v. *Kirker* (9); *Wilson* v. *Ingham* (10); *Western Maori Election Petition* (11); *Hardcastle on Election Petitions*, 2nd ed., p. 36; *Ex parte Dalton* (12); *Ex parte Moore* (13); *Ex parte Ogden* (14); *Ex parte Gale*; *In re McMaster* (15); *In re Elkington* (16); *R.* v. *Macalister* (17); *Mitchell* v. *Simpson* (18); *Young* v. *Gentle* (19); *Saunders* v. *Borthistle* (20); *Mackay* v. *Davies* (21); *In re Budgett*; *Cooper* v. *Adams* (22); *Williams* v. *Dunn's Assignee* (23).

Cur. adv. vult.

June 13.

The following judgments were read :—

GRIFFITH C.J. This is an appeal from an order for ouster made by the Supreme Court of New South Wales under the following circumstances. At an election of aldermen for a ward of the City

(1) L.R. 10 C.P., 733.
(2) 5 B. & Ad., 855.
(3) 4 O'M. & H., 105.
(4) 5 O'M. & H., 120, at pp. 125, 130.
(5) 1 C.L.R., 121, at p. 129; 10 A.L.R. (C.N.), 25.
(6) 4 C.B., 866.
(7) 2 O'M. & H., 152.
(8) 4 C.L.R., 1463.
(9) 7 I.R. C.L., 30.
(10) 64 L.J.Q.B., 775.
(11) 28 N.Z.L.R., 843.
(12) Browning's Municipalities Act of 1867, App., 171.
(13) 8 N.S.W.L.R., 108.
(14) 14 N.S.W.L.R., 86.
(15) 7 W.N. (N.S.W.), 1, 93.
(16) 14 S.C.R. (N.S.W.), 283.
(17) Municipal Association Reports 1868-1892, 518.
(18) 25 Q.B.D., 183, at p. 189.
(19) (1915) 2 K.B., 661, at p. 668.
(20) 1 C.L.R., 379, at pp. 383, 389.
(21) 1 C.L.R., 483, at p. 491.
(22) (1894) 2 Ch., 557.
(23) 6 C.L.R., 425, at pp. 430, 441.

of Sydney held in December 1915, the appellant and respondent and a Mr. Harris were candidates. On counting the ballot papers it appeared that Harris had obtained 872 votes, the appellant 843, and the respondent 840. Upon an application to the Supreme Court by the respondent for an order to oust the appellant, it was proved that 13 strangers claimed and were allowed to vote in the names of 13 persons entitled to vote but who did not vote. The fact that the applicant was a defeated candidate is, of course, not material. The Supreme Court, following several of its own previous decisions, to which I will afterwards refer more particularly, held that the appellant was not duly elected, and made the order. The words of the Statute under which it was made (*Sydney Corporation Act*, No. 35 of 1902, sec. 56) are as follows:—"If it appears upon affidavit that any person declared to be elected . . . alderman has been unduly elected . . . the Supreme Court, or any Judge thereof, may grant a rule or order calling upon such person to show cause to the Court why he should not be ousted of the said office." "Upon the return of such rule or order, if it appears to the Court that such person so elected . . . was unduly elected, . . . the Court may make such rule or order absolute."

The only relevant facts are that 13 persons not entitled to vote were allowed to vote, and that this number was sufficient to affect the result of the election. Whether it did affect the result or not is not known, and is not capable of ascertainment, since under the system of election prescribed by the *Sydney Corporation Act* the ballot papers do not bear any distinguishing mark by which they can be identified.

It is, therefore, at best, uncertain, and must remain uncertain, whether the appellant had a majority of valid votes or not. When it is suggested that the 13 personators may voluntarily come forward and give evidence as to how they voted, I am reminded of the unfortunate remark of Queen Marie Antoinette when told that the women complained that they had no bread. Moreover, I do not think that their evidence would be admissible, or, if admissible, credible.

A Full Bench of the Court was assembled to deal with the case because it is one of far-reaching importance, not only to the

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people of Sydney but to the whole Commonwealth. The question for decision is whether, when at an election conducted by ballot where there are no means of identifying the ballot papers cast by individual voters a number of persons not entitled to vote have by means of personation succeeded in voting and the number of such persons is greater than the difference between the number of votes cast for a candidate who is declared elected and that cast for the candidate who obtains the next highest number, the election can be impeached. The only alternative is that the personated votes must be counted as valid and effectual for all purposes. Such a proposition is so shocking that it bids one pause before holding that it is a part of the unwritten law of the realm. It is certainly not to be found in the Statute Book. The election laws of the Commonwealth and of most of the States are in this respect not distinguishable from the provisions of the *Sydney Corporation Act*, so that the decision in the present case must govern the whole of the Commonwealth. If the appellant's contention is sound, this result, amongst others, would follow: that if at an election for the Senate it appeared that a number of personators had succeeded in voting, the number of whom was greater than the majority by which the votes cast for the candidates returned exceeded the number of votes cast for the candidates next on the list, the election would be valid, and the persons returned as Senators would hold their seats for six years, although it would be quite uncertain whether a majority of qualified electors had or had not voted for them. For, as already pointed out, it is impossible under the system of ballot in force here to ascertain the fact. Where, as in the United Kingdom, the system of numbering the ballot papers is adopted, the difficulty cannot arise, for the ballot paper of the personator can be identified and rejected on a scrutiny. Before the ballot was adopted, and when voting was open, it was equally possible to identify a personator's vote and reject it. No direct assistance, therefore, is to be looked for in British decisions, and recourse must be had to the unwritten law, sometimes spoken of as the "common law of elections."

The duty of this Court is not limited to following ancient precedent with a halting foot. It is not a mere gramophone. No doubt the

common law is to be ascertained with the aid of precedent, but, as Viscount *Haldane* recently said in the case of *Hammerton* v. *Lord Dysart* (1), a case in which it was necessary to declare for the first time the common law on a particular point :—" The judgments in these two cases . . . illustrate the truth that it is not by looking for analogies between the particular facts in old and modern cases that the law applicable is to be gathered. It is by ascertaining what is the foundation of principle on which the Courts have really built in deciding them and applying the result " to the particular case. One of the most important functions of this Court, as I have hitherto understood them, is to ascertain and declare the unwritten law of the realm, which provides for and governs contingencies not specifically dealt with by positive law, and to apply that law to the novel and changing circumstances arising in a newly settled country or under experimental forms of legislation. During the argument I suggested that where a difficulty arises in consequence of an omission in a Statute to deal expressly with a particular event, the question for the Court is : What did the Legislature mean should follow in such an event ? On further consideration I think that the real question is : What does the common law prescribe as the consequence of such an event ? Possibly that is only another and more accurate way of saying the same thing.

In the present case the question is : At common law is such an election liable or not liable to be declared invalid ? There is no third alternative.

The term " election " in itself connotes choice by a majority of competent electors. The first duty of every representative body is to verify the title of the persons claiming to be members of it. This is recognized in every civilized country that has representative assemblies. In the British Parliament, and for a long time in the Australian Colonial Parliaments, the duty was delegated to committees, called Committees of Elections and Qualifications, but has of recent years been entrusted to specially constituted tribunals. The principles upon which these tribunals (whether the collective body, the election committee, or the elections tribunal) are to

(1) (1916) A.C., 57, at p. 75.

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act in determining the validity or invalidity of an election, except in a few cases in which a personal disability is imposed upon a candidate, are not defined by any positive law, but are left to be determined by the unwritten or common law of elections, which is no more than a rule for the protection of the community from the usurpation of intruders into its affairs.

So far as relevant to the present case, this common law may be summed up in one sentence, thus :—If, having regard to the circumstances attendant upon an election, it appears that there is good ground for believing that the formal result does not represent the free and deliberate choice of the competent electors, the election may be declared void.

It will be found on consideration that this rule is the foundation, and the only foundation, for the power always assumed to exist of avoiding an election.

The existence of a competent tribunal to make the declaration is, of course, assumed. In the absence of such a tribunal the rule would not be abrogated, although it would be in abeyance. And this is an appropriate place to remark that no tribunal has hitherto been appointed for dealing with the case of a poll on the occasion of a proposed amendment of the Constitution. The contest between Mr. Hayes and Mr. Tilden for the Presidency of the United States of America shows the necessity for making provision for such a case. Possibly the remedy would be found in an inquiry conducted under the authority of the Governor-General with the object of informing his mind on the question whether the proposed law was really approved by a majority of all the competent electors voting, so that if he were not satisfied that it was so approved it would be his duty to withhold the royal assent.

It seems almost derisory, although I fear it is necessary, to point out that no Statute is needed to deny to an intruder the right of voting.

Before the elaborate statutory provisions now in force in the United Kingdom and Australia relating to the conduct of elections, a breach of any of which may entail the invalidity of the election, were enacted, the grounds on which the validity might be impeached were practically confined to cases in which such influence was

brought to bear upon large bodies of the electors as to justify the belief that the choice was not free and deliberate. (I remark, in passing, that the invalidity of an election for non-compliance with such statutory provisions is not usually declared by Statute, but is left to follow from the application of the common law of elections.) The principal grounds for impeaching an election at common law in the United Kingdom were undue influence, intimidation, general corruption, and riotous disturbance during the election. Each of these cases gave rise to the application of the same general rule, which was afterwards applied by the Courts to breaches of statutory provisions regulating elections. If either of these conditions was shown to have prevailed to such an extent as to be likely to have affected the freedom of choice, the election was declared void. It is manifest that in such cases it was generally impossible to prove affirmatively that the result of the election was affected. It was therefore always held sufficient to establish that the extent of the improper practices or other disturbing elements was such as to show good ground for believing that the final result might probably have been affected. The extent of the corrupt or illegal practices was, consequently, a material point. It is evident, for instance, that if the successful candidate had a majority of 500, and the evidence of intimidation or undue influence was limited to 50 persons, the freedom of choice of the whole electorate was not likely to have been affected. This was very clearly pointed out by *Bramwell* B. in the *North Durham Case* (1) :—"I take it that the law is this : first of all, there is the statutory intimidation, that contemplated by the Statute, if one may use such an expression, that is, an intimidation contemplated by the Statute which avoids the seat, where a candidate or his agent is guilty of it. But besides that there is another intimidation that has been called a common law intimidation, and it applies to a case where the intimidation is of such a character, so general and extensive in its operation that it cannot be said that the polling was a fair representation of the opinion of the constituency. If the intimidation was local or partial, for instance, if in this case it had been limited to one district, as Hetton is, I have no doubt that in that case it would have

(1) 2 O'M. & H., 152, at p. 156.

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been wrong to have set aside this election, because one could have seen to demonstration that the result could not possibly have been brought about by intimidation, and that the result would not have been different if it had not existed. I do not mean the result of the polling in that particular district, but the general result of the majority for the respondents. But where it is of such a general character that the result may have been affected, in my judgment, it is no part of the duty of a Judge to enter into a kind of scrutiny to see whether possibly, or probably even, or as a matter of conclusion upon the evidence, if that intimidation had not existed, the result would have been different. What the Judge has to do in that case is to say that the burden of proof is cast upon the constituency whose conduct is incriminated, and unless it can be shown that the gross amount of intimidation could not possibly have affected the result of the election it ought to be declared void. Now in questions of this sort one must look not only to the amount of intimidation, but to the absolute majority which has been obtained. It was the opinion of Mr. Justice *Willes*, and I believe it is not inconsistent with the opinion of Mr. Justice *Keogh*, as expressed in that celebrated and most useful judgment which he gave in the *Galway Case*, that you are to look at the probable effect of intimidation, which consists of two things, the extent and operation of the intimidation, and the majority which the sitting members got. Now, I think if it were otherwise, and if one were told that partial intimidation would avoid an election, although it were certain that it had not affected the result of the election, the consequence would be that a few mischievous persons might upset every election. On the other hand, if one were inclined to go into a kind of scrutiny the consequence would be that one might make a very great many mistakes; besides, I am of opinion that, where there has been so large an amount of intimidation that it is uncertain whether the result would have been the same without it, it cannot be said that the election was free, or that it represented the real opinion of the constituency, but that it must be held void on account of that uncertainty."

In the *West Belfast Case* (1) an attempt was made to extend the

(1) 4 O'M. & H., 105.

doctrine applicable to general corruption to the case of personation, and it was contended that if several instances of personation were shown to have taken place it might be inferred that the evil was general; but the notion was rejected, and it was remarked that personation was not contagious or infectious. For reasons already given there was no need for such a doctrine, because when contested elections were conducted by open poll personated votes could be identified and disallowed on scrutiny. The case of unidentifiable personation is in principle analogous to riotous disturbance, the only difference being that the disturbance is caused by fraud instead of force.

Since the elaborate statutory provisions prescribing the conduct of elections were enacted many cases of disputed elections have arisen in which the objection to the validity of the election has been founded upon disobedience to some positive provision. The *Ballot Act* 1872 (35 & 36 Vict. c. 33), by which in the United Kingdom these conditions are prescribed, provided (sec. 13) that no election should be declared invalid for non-compliance with the rules for conduct of elections prescribed by that Act if it appeared to the tribunal having cognizance of the question that the election was conducted in accordance with the general principles of the Act and that such non-compliance did not affect the result of the election. But it did not say that an election should not be declared invalid for any other reason.

It has never been doubted that the common law applicable to parliamentary elections is applicable to municipal elections.

In the case of *Woodward* v. *Sarsons* (1875) (1), which was the case of a municipal election, the Court said :—" 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 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

(1) L.R. 10 C.P., 733, at p. 743.

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fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the 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 necessary 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 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."

In the *Islington Case* (1), before *Day* and *Kennedy* JJ., it appeared that 14 persons had been improperly allowed to vote at the election. The sitting member had a majority of 19. *Kennedy* J. said :—" It follows that the total of votes, in receiving which we think that the presiding officers, while acting quite honestly, did not rightly construe the election Statutes, is 14. Even if all those improperly received votes are counted as votes which were given for the respondent Lough—and in justice to the petitioner it must be so assumed—there remains a clear majority of five votes for him. We agree with Mr. *Jelf* that, there being an infraction of the law in the supply of ballot papers at the polling stations in Bingfield Street, the burden of proving that this infraction did not and could not

(1) 5 O'M. & H., 120 ; 17 T.L.R., 210.

affect the result of the election rested in this case upon the respondents. We think that the gist of the judgment of Chief Justice *Monaghan* in the case of *Gribbin* v. *Kirker* (1), so far as it is a decision of law and not of fact, is that in such a case as the present the petitioner is not called upon to prove affirmatively that the result of the election was affected by the proved transgression of the law; but the respondents must satisfy the Court that it was not and could not be affected by it." The question of a scrutiny did not arise.

It appears, therefore, that the eminent Judges who were parties to these decisions were of opinion that if in a case to which the common law of elections applies it appears upon the evidence that a mishap or untoward event has occurred of such a nature that it may have probably affected the result the Court must act on the assumption that the result was affected. *Bramwell* B. was evidently of the same opinion.

In the *Riverina Case* (*Chanter* v. *Blackwood* [*No.* 2] (2)), before the Court of Disputed Returns (constituted by myself), in which it was proved that the votes of electors not entitled to vote, sufficient in number to turn the scale, had been counted, it was held that the election was invalid. It did not occur to me to regard the circumstances under which the "mishap" had arisen as material any more than the initial letters of the names of the persons who had been wrongly allowed to vote. My opinion was expressed in a very few words (3): "In these circumstances can I say that the majority of the electors may not have been prevented from exercising their free choice." After pointing out that this result must necessarily follow if a sufficient number of electors were wrongly prevented from voting, I added (4): "I cannot see that any other result can follow when a number of persons, sufficient to change the majority into a minority, . . . have wrongly been allowed to vote." The same principle was applied by the Full Court, consisting of all its then members, in the *Wimmera Case* (*Hirsch* v. *Phillips* (5)). Both these cases were decided in 1904, and have stood as the law

(1) 7 I.R. C.L., 30.
(2) 1 C.L.R., 121.
(3) 1 C.L.R., at p. 130.
(4) 1 C.L.R., at p. 131.
(5) 1 C.L.R., 132.

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of the Commonwealth from that time. The same principle was again applied by *Barton* J., sitting as the Court of Disputed Returns, in the case of *Blundell* v. *Vardon* (1). The Court is now asked to overrule all these cases.

I am unable to find any principle upon which the cause of the intrusion of strangers into an election can be regarded as relevant to the effect of the intrusion. That effect is identical, whatever be its cause. Such a distinction may, of course, be made by Statute, but there is no Statute dealing with the subject.

With all respect to the opinion of my learned brethren who form a majority of the Court, the proposition that the intrusion into an election of a sufficient number of strangers to turn the scale is not by the common law of England and Australia a ground for attacking the validity of the election remains to me, as I said during the argument, unthinkable.

The only authority mentioned in argument as suggesting that the common law of elections does not govern such a case is *R.* v. *Jefferson* (2).

That case was an application for a writ of *quo warranto* to oust from office a person who had been elected a trustee of the harbour of Whitehaven on the ground that a majority of the persons admitted to vote were not qualified to vote and that it did not appear that he had a sufficient number of legal votes to entitle him to the office. The election was held under the provisions of several local Acts, which are not set out in the report further than to say that they required that on certain specified days fourteen persons were to be chosen by ballot by a majority of the inhabitants of the harbour of Whitehaven then dealing in goods subject to certain duties, or masters or holders of a sixteenth share in vessels belonging to the harbour of Whitehaven. Evidence was given that all persons who claimed to vote were allowed to do so. One deponent stated that he believed that the majority of the persons who voted for Jefferson were not qualified, and that he also believed that if none but qualified persons had voted Jefferson would not have been elected. It was alleged in other affidavits that 1,060 persons voted, and that about 600 of them were not qualified. These affidavits were contradicted,

(1) 4 C.L.R., 1463.

(2) 5 B. & Ad., 855.

and evidence was given to show that persons wishing to dispute the qualification of intending voters had an opportunity of doing so, and that some were in fact refused upon objections so taken. In showing cause against the rule Sir *James Scarlett* (afterwards Lord *Abinger*) argued that no defect of title to the office was shown, that nothing was stated as to any person who voted for Jefferson but a belief that many of them were not qualified, and it was not said that any of them were objected to. The Court then called on Mr. *Coltman* (afterwards *Coltman* J.), who contended that there must be some means of raising the question, and that the application for a *quo warranto* was the proper course. *Parke* J. remarked that it had been objected in that Court before to the taking of votes by ballot—that it made a scrutiny impracticable. The reference was apparently to the case of *Faulkner* v. *Elger* (1), where *Holroyd* J. is reported to have said :—" I have great doubt, also, whether election by ballot be a legal mode of election or not. Some advantage may accrue from it, such as avoiding ill will amongst the parishioners, and leaving the voters uninfluenced ; but I think that it is the duty of the returning officer to see that the person returned is duly elected, and that he is bound to use reasonable means to attain that end. Now if he takes down the names of the voters, and the persons for whom they vote, and it afterwards appears that any person has been admitted to vote who has no right to vote, his name may, on a scrutiny, be struck off. In the case of an election by ballot, the returning officer puts it out of his power to ascertain whether the party who voted had a right to vote or not." Mr. *Coltman* then contended that if a *quo warranto* went it would lie upon Jefferson to prove how the votes were recorded, to which Lord *Denman* C.J. rejoined that that would be against the principle of the ballot. After further argument it was urged that if this were not allowed there would be no means of investigating the votes, on which *Taunton* J. remarked (2), " That is the vice of the system : we are not bound to find a remedy for it," and *Parke* J. said, " The only remedy would be to exclude bad votes at first." The judgment of the Court was (2) : " No *primâ facie* case is made for this application.

(1) 4 B. & C., 449, at p. 457. (2) 5 B. & Ad., at p. 853.

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The officer is called upon to show title without the possibility of proving it. All the bad votes may have been for the opposing party " ; and the rule was discharged.

Before accepting this as an authoritative decision that by the common law of England under the system of voting by ballot for a parliamentary or municipal officer with unnumbered voting papers there is no remedy against personation, the time and circumstances of the decision must be carefully considered. The application was for a writ of *quo warranto*, under which, if granted, the facts, if disputed, would have to be determined by a jury, the onus lying on the prosecutor. Whether the common law rule governing parliamentary elections was applicable to such a case, and, if so, whether the duty of applying it could be entrusted to a jury, were questions on which the Court pronounced no opinion. If the case had, like *Woodward* v. *Sarsons* (1), come before a tribunal authorized and required to decide it according to the common law of parliamentary elections there can be no doubt that, if the tribunal had thought that a *primâ facie* case had been made out showing that there was good reason to believe that such a large number of unqualified persons had voted as probably to affect the result, the election would have been avoided. The decision was that in the opinion of the Court the applicant had failed to make a *primâ facie* case, which was a decision on the particular facts, and on nothing else. The case is also interesting as containing a record of the dislike of some members of the Court to the novel system of voting then advocated, against which one of the common objections urged was the impossibility of detecting personation. The idea of numbering and identifying ballot papers had not been suggested. I have, indeed, myself listened to, and taken part in, debates on this point apropos of the proposal to identify the ballot papers by numbers, and the possibility of such a system destroying the secrecy of the ballot.

The observation that the actual facts as to the persons for whom the votes were actually cast were incapable of ascertainment was a mere truism. The question of the effect of this difficulty on a writ of *quo warranto* did not arise for decision.

(1) L.R. 10 C.P., 733.

This case cannot be regarded as an authority on any point relevant to parliamentary elections. It does not appear to have been ever cited as an authority for anything in any English Court, and is not mentioned in the *Laws of England* under election law. It is only cited as an authority as to procedure upon *quo warranto* (vol. x., p. 139).

A distinction was attempted to be taken between mishaps arising from breaches of statutory provisions and the criminal intrusion of strangers. I am quite unable to apprehend the distinction, or to see how a breach of the criminal law which may have affected the result of an election can have less effect than a mere breach of a statutory direction producing precisely the same effect. The result in either case is equally to bring the case within the principle already stated. It is, no doubt, a fact that in *Woodward* v. *Sarsons* (1) and the *Islington Case* (2) the mishap arose from a mistake of the presiding officer, but it is nowhere suggested that that fact was material. In each case the only fact treated as material was whether the mishap could have affected the result. And, remembering that the proper choice of representatives at an election is a matter of public interest, and not a matter of private concern of the candidates, it is difficult to see on what principle the effect of a mere mishap can be fatal while a crime producing the same result is negligible. The injury to the public at large is equal and identical in each case. The argument is to me not distinguishable from an argument that a contract cannot be avoided for fraud if the fraud is such as to constitute a criminal offence. Unless, therefore, some statutory provision or some binding authority can be found which differentiates between them, we ought, I think, to apply the same rule.

I am not aware of any reported case in which the intrusion of persons not entitled to vote has been caused by personation. The decided cases are, however, all applications of the general principle which I have stated. I have shown why the precise point cannot arise in England.

With regard to the argument that it can not be shown affirmatively that if the personated votes had not been given the result of the

(1) L.R. 10 C.P., 733. (2) 5 O'M. & H., 120; 17 T.L.R., 210.

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election would have been different, that argument is equally applicable to the case of the improper rejection of a number of votes sufficient to turn the election, which would admittedly be a fatal objection.

In this connection I will quote the words of Sir *Samuel Evans* P. in the recent case of *The Kim* (1), dealing with a different subject matter, but very apropos to the present case :—"To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities, and to be blinded to the realities of the case."

In my opinion the effect of the provisions of sec. 56 of the *Sydney Corporation Act* that if it appears to the Court that the person whose election is impeached was unduly elected the Court may make absolute the order of ouster is twofold : in the first place, to substitute that proceeding for the common law writ of *quo warranto*, which was an imperfect remedy ; and, in the second place, to declare that the common law of elections is to be applied in determining the validity of the election. The section has no other effect. It does not create the invalidity, but merely names the tribunal which is to declare it. I need not refer in detail to the various provisions of the Act which lead unmistakably to that conclusion. If authority were needed, it is supplied by the case of *Woodward* v. *Sarsons* (2).

This is sufficient to dispose of the present appeal. But as some arguments were founded upon the special provisions of the Sydney Act, which, it was said, take this case out of the general rule, if such a rule exists, I will briefly deal with them.

The *Sydney Corporation Act* provides that there shall be a citizens' roll (sec. 9) which shall contain the names and qualifications of all persons qualified to vote (sec. 12), that there shall be two aldermen for each ward who shall be elected by the persons on the roll for each ward (sec. 21), and that a person who votes or attempts to vote in or for a ward in respect of which he is not qualified shall be guilty of a misdemeanour. This is surely a sufficiently clear prohibition of personation, if such a prohibition were needed. But the presiding officer is prohibited from inquiring into the identity of persons claiming to vote if they comply with certain prescribed conditions,

(1) (1915) P., 215, at p. 286. (2) L.R. 10 C.P., 733.

unless he personally knows that they are not the persons whom they claim to be. When I hear it gravely maintained in a Court of Justice that this very common provision in election Acts indicates that the Legislature intended that its effect should be to validate to all intents and purposes votes given by successful personators, so that no objection to the validity of the election can be founded upon them unless their votes are identified, I cannot help wondering whether my senses are deceiving me, or whether I am really invited to follow the cases reported by the learned writer known as *Lewis Carroll*, but not usually cited in Courts of Justice (1).

I will now refer to the cases decided by the Supreme Court of New South Wales which were followed by that Court in the present case, and which we are asked to overrule.

Ex parte Moore (2), decided in 1887 by a Court consisting of *Darley* C.J., *Faucett* and *Innes* JJ., was an application for ouster of an alderman of the city of Sydney on the ground that a number of votes had been cast at the election by persons not entitled to vote and sufficient in number to turn the scale. The relevant statutory provision then in force was the Act 43 Vict. No. 3, sec. 50 (1879), of which sec. 56 of the Act of 1902 is a verbal transcript. The provisions as to voters and voting were also identical with those already mentioned in the Act of 1902. It is not clear whether the presiding officer by whom the votes were received could have refused to issue the ballot papers to the intruders. The mistake or mishap appears to have been innocent in the sense that it was not caused by fraud or crime. The Court, following *Woodward* v. *Sarsons* (3), held that the election was invalid.

Ex parte Ogden (4), decided in 1893 by a Court consisting of *Windeyer*, *Stephen* and *Foster* JJ., was a case of a municipal election. The statutory provision under which the application was made was sec. 99 of the *Municipalities Act* 31 Vict. No. 12, which was with merely verbal variations identical with sec. 50 of the Act 43 Vict. No. 3. The provisions of that Act with regard to the preparation of the voters' roll, the questions permitted to be put by the presiding officer to a person claiming to vote, and the offence of personation,

(1) A.A.W., T.L.G., *passim*.
(2) 8 N.S.W.L.R., 108.
(3) L.R. 10 C.P., 733.
(4) 14 N.S.W.L.R., 86.

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were also indistinguishable except in verbiage from those of the Act of 1902. The objection taken was that certain persons whose names were on the voters' roll were disqualified by other laws from voting, some as being aliens, others as being married women, and that the number of disqualified persons who voted was sufficient to turn the scale. The Court held that the election was invalid. It was not decided, and is by no means clear, whether the presiding officer could have refused to allow the disqualified persons to vote, but it was not suggested that he had been guilty of any default in the conduct of the election. A decision to the same effect had been given in 1872 (*Ex parte Dalton* (1)).

In the present case, however, it is suggested, as already said, that the sole foundation of the power to declare the election invalid is a mistake on the part of the officers conducting it. No trace of such a rule is to be found in any of the reported cases, but Mr. *Knox* referred us to the case of *In re Elkington* (2), decided in 1876 by a Court consisting of *Martin* C.J., *Hargrave* and *Faucett* JJ., who held that under the Act 31 Vict. No. 12 a ratepayer who has not paid his rates is not entitled to vote although on the voters' roll, and the case of *R.* v. *Macalister* (3), in which the election of an alderman was held invalid on the ground that voters who had not paid their rates had been allowed to vote in sufficient numbers to turn the scale.

It is clear, therefore, that it has been the settled law of New South Wales, at any rate since 1887, that the intrusion into a municipal election (including an election of aldermen for the City of Sydney) of a number of unqualified persons sufficient to turn the scale invalidates the election.

I think that this Court, sitting as a Court of appeal from a decision upon the construction of State Statutes relating solely to the domestic affairs of the State, and following earlier decisions which have stood for more than a quarter of a century, ought itself to follow those decisions unless it is prepared to declare that they are clearly wrong. This opinion was expressed by the Court in the case of *Saunders* v. *Borthistle* (4). It would need a man with more confidence in his

(1) Brown. Municip. Act of 1867, App., 171.
(2) 14 S.C.R. (N.S.W.), 283.
(3) Municip. Ass. Rep., 1868-92, 518.
(4) 1 C.L.R., 379, at p. 390.

own wisdom than I can claim to possess, to make such an affirmation in the face of the contrary opinion of twelve Judges of the Supreme Court of New South Wales and three members of this Bench. In the United States of America it is the practice of the Supreme Court as a matter of comity to give the greatest weight to the opinions of the State Supreme Courts on the effect of State Statutes.

The decision of *Cooper* and *Edwards* JJ. in the *Western Maori Election Case* (1) is to the same effect as the New South Wales cases.

Apart from all these considerations, it appears that sec. 50 of the Act 43 Vict. No. 3, under which *Ex parte Moore* (2) was decided, was repealed and re-enacted in identical terms by the Act of 1902, and that the provisions of sec. 99 of the Act 31 Vict. No. 12, under which *Ex parte Ogden* (3) was decided, were repealed and re-enacted in identical terms by the Act 61 Vict. No. 23 (*Municipalities Act* 1897), which was a general consolidating and amending Act, and in which it stood as sec. 109. This Act was repealed by the *Local Government Act*, No. 56 of 1906, but the same provisions were re-enacted, and now stand as sec. 72.

It is a settled rule of the construction of Statutes that where an Act which has received authoritative interpretation by judicial decision is repealed and re-enacted it should be assumed that the Legislature intended the words adopted and repeated to bear the meaning which has been judicially put upon them (*Saunders* v. *Borthistle* (4)). The latest instance of the application of the rule is to be found in the case of *Young* v. *Gentle* (5), a very strong instance.

In the present case we have two coincident lines of legislation in identical terms on similar subjects, in each of which the Legislature, after the authoritative decisions of the Supreme Court of New South Wales as to the functions conferred upon it with regard to municipal elections which I have quoted, has repealed and re-enacted the repealed language. It is in my opinion impossible, without entirely disregarding well established rules, to overrule the decision of the Supreme Court now under appeal.

(1) 28 N.Z.L.R., 843.
(2) 8 N.S.W.L.R., 108.
(3) 14 N.S.W.L.R., 86.
(4) 1 C.L.R., 379, at p. 390.
(5) (1915) 2 K.B., 661, at p. 668.

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Although this last point is sufficient to dispose of the appeal, I should personally regret that it should be disposed of on that ground only.

In my opinion the appeal should be dismissed.

BARTON J. At the proceedings challenged two aldermen were to be elected for Denison Ward in the City of Sydney. The totals of the votes as returned were, for a Mr. Harris 877, for the appellant 843, and for the respondent 840, and Harris and the appellant were declared elected. The respondent applied to the Supreme Court under the *Sydney Corporation Act* of 1902 (sec. 56) to oust the appellant upon the following facts:—Thirteen unqualified persons wrongfully voted in the names of qualified electors. Each of them made and subscribed before the presiding officer the prescribed declaration setting forth a title to vote. Under sec. 40 (3) the presiding officer is entitled to put only one question to a person applying to vote, namely—"Are you the person named as number in the citizens roll for ward?"; the name and corresponding number being at the time mentioned to him. Every person wilfully making a false answer to this question, if put, or a false declaration under sec. 40 (1) or (2), is to be deemed guilty of a misdemeanour. No person is allowed to vote unless he makes such declaration and, if asked, answers such question "satisfactorily." There is a proviso (sub-sec. 6) that *no person shall be excluded from voting* at an election unless it appears to the presiding officer that the person claiming to vote is not the person whose name appears on the roll, or that he has previously voted at the same election within the same ward, or otherwise contrary to the Act.

Hence, so far as the officials are concerned, the vote must be accepted if the person makes the declaration and, if asked, answers the question satisfactorily, however false his declaration and his answer; unless indeed the presiding officer knows or learns that the vote is a false one. By sec. 54, any person who votes a second time in the same ward, or who votes without qualification, or who personates a voter, or any person who attempts any of these three things, commits a misdemeanour. All three are placed on the same footing. It is contended that unless there is something like a general

consensus of personation, the Court has no power, when invoked on the ground of any personation, to hold that a person was "unduly elected," and should therefore be ousted.

On affidavits setting forth the facts as to the personations, the Supreme Court held that the appellant was "unduly elected." *Ferguson* J., who delivered the judgment, after adverting to the proof of personation, said that the Court had no means of informing itself for whom those votes were given, and it was the policy of the law in the interests of the secrecy of the ballot that the information should not be obtained. (It may be mentioned here that the Statute provides no means of identifying the ballot papers so as to disclose for which candidate any vote is cast.) It was therefore, his Honor said, impossible to say whether a count of the remaining votes properly cast would show a majority for Bowen or for Bridge. He pointed out that there was no ground for impeaching the election so far as the mode of conducting it was concerned. The question for the Court was, whether it was proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate (either Bridge or Bowen) whom the majority might prefer. The Court must take it that the apparent majority for Bridge might have been entirely made up of votes cast by persons who were not entitled to vote. It will be observed that the number of personators was over four times as great as the apparent majority of Bridge over Bowen.

Before examining in detail whether or not the Supreme Court was right, to the best of my opinion it is necessary to advert to some general considerations of which sight cannot be lost if the matter is to be duly weighed.

The first is that between municipal elections and parliamentary elections there is no difference in this respect, that the common law of elections applies where it is not expressly or impliedly excluded by Statute. The next is that the matter is not to be viewed from the standpoint that it is merely a struggle between two rival candidates in which they are the only persons interested. In this instance it is a fact that the election is tainted by fraud and falsehood. But even apart from that fact the question who is to sit and vote is one in which the citizens to be governed are deeply interested,

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and that not merely as spectators. For every citizen is wronged if the process called an election is rendered abortive, as an ascertainment of the choice of the electors, by the intrusion at the ballot of unqualified persons sufficient in number to prevent any real ascertainment. The case is only worse in degree, though it may be the same in kind, if the intrusion is effected by fraud or corruption and the number of intruders is sufficient to produce the same effect of uncertainty. But the citizens are as much deprived of their right of true choice in the first instance as in the second. Ordinarily the intrusion itself is fraudulent. But a true election may be prevented by the acceptance of the votes of merely unauthorized and unqualified persons. In the case of parliamentary elections the tribunal was originally a committee appointed from among the representatives of the electors. Their determinations were given, in a special sense, with an outlook upon the public interest, and not merely upon the interests of the parties to the contest. The change of tribunal made no change of principle.

It is not charged that the presiding officer made any mistake in his duty, but the complaint here is that he, and through him the citizens, whose servant or agent he was, were misled so that an abortive result was obtained. There was no mere mishap, but there was a criminal misuse of the ballot. It would be strange, indeed, if an election must stand when the official is induced by fraud and perjury, or by any less culpable means, to receive as votes things which are not votes to a number greater than that of the apparent majority, while at the same time the merely mistaken admission by the same official of a number of votes sufficient to turn the scale would avoid the alleged election. For the common law would certainly prevail to the latter extent. In the one case the mishap caused by intruders would be held, if we took the view of the appellant, to be of no moment as affecting the election, while in the other the innocent mistake of an official would make it nought.

The question depends on intrusion generally, and not merely on that form of it called "personation." If it is apparent, notwithstanding some intrusions, that the person declared elected has secured a number of votes which so overtop those cast for the competitor that, even allowing all the intruding votes to his opponent,

he must have been supported by a sufficient number of qualified votes to establish that he was really chosen by them, then neither personation nor any other form of intrusion affects the election. For the reality of the choice is apparent. But if the case is otherwise; if the number of false votes overtops the difference between the candidates, is it possible to say that one or the other was duly elected? If not, is it possible to say that there was a real election in the sense of an ascertainment of the choice of the qualified voters? For that is what an election means: nothing more, and nothing less.

I think it is a mistake to suppose that because the Statute says that false votes must be counted by the presiding officer, unless he knows of their falsity, it must be taken to say also that the election cannot be challenged before the appointed tribunal. He is not to be the judge. That is all. The Court is still open upon proof of the falsity. Can it be the law that a sufficient number of intrusions not discoverable upon the polling day must be taken afterwards to be the votes of citizens, and will keep the election safe afterwards in face of the discovery and proof of the intrusions? The Statute only says that the presiding officer is not the authority to decide, except in the case of his personal knowledge of the intrusion. But when the intrusion is of an extent in all probability fatal to a true election and beyond doubt rendering it impossible to say truthfully that either candidate was really chosen by those who had a right to choose, does the authority to do justice reside nowhere? I cannot think that to be the common law. It is in my judgment the common law that, upon proof of such a number of intrusions as would be sufficient to turn the scale, there is no election, because there is no ascertained choice. The common law does not commit the injustice of holding such a wrong to be a free and actual choice, nor does the Statute, expressly or by inference, demand that it be so accounted.

This view appears to me to be supported by the case of *Woodward* v. *Sarsons* (1), where the judgment of the Court, read by Lord *Coleridge* C.J., demonstrates that the provisions and rules of the *Ballot Act* 1872 (Eng.) (35 & 36 Vict. c. 33) did not prevent the Court

(1) L.R. 10 C.P., 733.

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from applying to elections the rules of the common law not displaced by the Statute. The question for decision material to this case was, what is the rule under which an election may be avoided under the common law of Parliament? Under this head, the Court was of opinion (1) 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 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 a fair and free opportunity of electing the candidate which the majority might prefer." (His Lordship gave a number of illustrations, which did not include personation as here complained of; but the enumeration did not, in my judgment, exclude this case any more than it excluded others which come within the principle enunciated.) His Lordship went on to say (2): "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." The Court of course held that if the proof only satisfied the tribunal that certain of such mishaps had occurred without affording reason to believe that there had been or might have been a prevention of the electors from expressing their will by electing the candidate they preferred, the tribunal could not, because of the mere existence of such mishaps, declare the election void by the common law. In arriving at this conclusion the Court compared the judgments of *Grove* J. at Hackney (3) and at Dudley (4), with those of *Martin* B. at Salford (5) and of *Mellor* J. at Bolton (6). All these judgments were held to express, but more accurately, the grounds of the decisions of the Committees of the House of Commons in many

(1) L.R. 10 C.P., at p. 743.
(2) L.R. 10 C.P., at p. 744.
(3) 2 O'M. & H., 77, at p. 81.
(4) 2 O'M. & H., 115, at p. 121.
(5) 1 O'M. & H., 133, at p. 140.
(6) 2 O'M. & H., 138, at p. 142.

cases before they were supplanted by a judicial tribunal. "As to the second" (alternative), "*i.e.*, that the election was not really conducted under the subsisting election laws at all," it was held (1) that though there was an election in the case under review "in the sense of there having been a selection by the will of the constituency, that the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as matter of fact, that the election was not an election under the existing law." Great mistakes in carrying out an election under those laws would not be enough. To be held void for that cause the election must have been carried out, not under those laws, but, either wilfully or erroneously, under some other method.

This decision applies to cases of election by ballot under any similar provisions—in that respect—to those of the English Act. The *Sydney Corporation Act* is similar in that respect. The reason why Lord *Coleridge* did not include in his illustrations the successful personation (which of course displaced their votes) of a number of electors sufficient to have ensured a majority in the other direction, was probably that under the English election laws personations are identifiable and the false votes rendered removable by the fact that the ballot papers bear numbers enabling comparison with the numbered roll. For the greater secrecy of the ballot the policy of the law here is to forbid the numbering of the ballot papers. Hence, while in England means exist of rectifying the totals in this respect, they do not exist here, and here, therefore, personation to the extent shown in the present case is the more clearly within the principles stated in this judgment. There is no provision in the *Sydney Corporation Act* for a scrutiny or recount after the declaration of the poll. The application to the Court, authorized in sec. 56, is the only means by which error, fraud or intrusion can be remedied. The grounds on which a person declared to have been elected may be ousted by the Court as having been "unduly elected" are left at large by that section, but a person holding the office may be unseated for want of capacity. The contrast there exhibited seems to show that the intention was that a person might be declared "unduly elected" on any ground which is within the common law of elections.

(1) L.R. 10 C.P., at p. 744.

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Before passing from this celebrated judgment I take leave to refer again to the phrase "reasonable ground to believe that *a majority of the electors* may have been prevented from electing the candidate they preferred." Was his Lordship referring to a majority of the *qualified* electors? If so, how can personators be included in the term?

The *West Islington Case* (1) was decided on grounds which, though within the decision of *Woodward* v. *Sarsons* (2), were not within that part of it which is material to the present case. The Election Petition Court there consisted of *Kennedy* and *Darling* JJ., and I mention the case merely for the purpose of pointing out that it was there held that the burden of proving that the irregularity did not affect the return of the candidate rested on the respondents to the petition, that is, on the candidate declared elected and the returning officer, who was one of the respondents in that case, but who is not a necessary party to the present case. *Gribbin* v. *Kirker* (3), which was cited to us, was dismissed with the observation that if it was an authority for anything at all, it was an authority for the opinion expressed as to the burden of proof. It may be that the Legislature of New South Wales, in using the term "unduly elected," wished to enable the Court to say that a proceeding was an undue election if upon the facts it could not be said to be a due election. As was pointed out by Mr. *Knox*, if it appears to be equally consistent with the facts before the Court that a person declared to be elected was or was not elected in the only true sense, namely, by the actual choice of qualified electors, what more has the applicant to prove so as to show that the will of the constituency has yet to be ascertained? What difference is made by the returning officer's declaration that a thing not ascertained is a fact? If the facts established that uncertainty, then does not the assumed election go for nothing? Granted that it is impossible for the respondent in the proceedings to prove his right to the return which the officer has made, that is beside the question if the uncertainty is once established. If it cannot be said there was a real election, that is ground enough for voidance, and the applicant is not to be forced to

(1) 17 T.L.R., 210.
(2) L.R. 10 C.P., 733.
(3) 7 I.R. C.L., 30.

go further merely by reason of the returning officer's declaration. It is the right of the citizens concerned to have a true election, and there is only one way of securing that. If a proceeding is once shown to be void, how can he who has shown that be expected to give in addition proof that the proceeding was really valid and in his favour?

Some light as to the true criterion of a real election may be gained from the history of the matter. At first the method of election was by show of hands, unless indeed it was also allowable to decide by voices. *Brooke* C.J. said, in the old case of *Buckley* v. *Rice Thomas* (1), in which the Sheriff of Carnarvon was sued for a penalty for wrongfully returning another candidate as Knight of the Shire in place of the plaintiff, who claimed the majority of votes:—"The election might be made by voices or by hands, or such other way wherein it is easy to tell who has the majority, and yet very difficult to know the certain number of them. And in such manner there are divers elections in London. And I myself was elected in London by holding up of hands." He also referred to a case in the time of Henry VII. in which the legality of that method of election was virtually admitted. *Staunford* J. said (2), referring to an objection that there had not been a poll:—"As to the second point, it seems to me that he" (the Sheriff) "shall not be compelled to show the certain number of the electors. For since he cannot be intended to have certain knowledge thereof, he shall not therefore be compelled to show the certainty. And perhaps he was elected by voices, or holding up of hands, and not by the number of persons in certain." This case was decided in 1554. The report shows that up to the time of Phillip and Mary elections were taken by the view or the voices, and that in the opinion of the Judges a poll was not then essential in the case of a contest. It is true that in later days a poll was held necessary in such a case. But is it possible to suppose that originally an election was held good, no matter how the voices or votes of true electors were nullified by the free and wholesale intervention of intruders? In those times the elections were by freeholders. Is it possible that the voting by voice or show of hands was not confined to freeholders, but left open to all comers?

(1) 1 Plowd., 118, at p. 128.

(2) 1 Plowd., at p. 123.

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Is it not beyond credence that elections to be decided only by the votes of freeholders were allowed to be invaded by as many intruders as chose to come in and swamp the majority, and that, if they did so to such an extent as to render the question, who was elected, an insoluble puzzle, the law, whether administered by committee or Court, was powerless to order a real election in place of the false one?

The *Sydney Corporation Act* 1902, by sec. 51 (1), applies the provisions of secs. 109 to 114 inclusive and of sec. 116 of the *Parliamentary Electorates and Elections Act* 1902 to all elections held under the Corporation Act, *mutatis mutandis*, and, by sub-sec. 2, any of the acts mentioned in the said sections is to render void the election of the person responsible for such act, *i.e.*, the candidate declared elected, whether the act is committed by himself or by his agent. These acts are bribery, treating, intimidation and the like. These sections have nothing to do with general corruption or intimidation not implicating the candidate. They have nothing to do with those acts of other persons which are among the common law reasons for upsetting an election. The argument of the respondent is that these other reasons stand, seeing that they are not excluded by the Statute. The appellant contends that the *Sydney Corporation Act* has the effect of sweeping them away. Is it a code in the sense that it does away, so far as the City of Sydney is concerned, with every common law principle that applies to elections? I think that cannot be, though it may be a code which nevertheless sanctions those principles. The words "unduly elected" are wide in their ordinary significance. If the appellant's argument were correct, they would be restricted to cases of misconduct of candidates and agents under the cited sections transcribed from the *Parliamentary Electorates and Elections Act* of 1902 as adopted by sec. 51, and numerous miscarriages and abuses at the elections, fatal in reason as destroying their certainty and rendering the question "who was really chosen?" impossible to answer, would, as against the citizens, be held to be protected and sanctioned by the will of the Legislature. On this question my brother *Isaacs* has been so kind as to refer me to a case of *Sharpness New Docks &c. Co.* v. *Attorney-General* (1). In that case the question was whether the common law liability to

(1) (1915) A.C., 654.

repair certain bridges, the construction of which had been authorized by an old Statute, which provided nothing to take the place of the common law obligation to keep in repair, continued notwithstanding the passage of a later Statute making express provision on that very subject. The House of Lords, having regard to the language of the later Statute, held it to be a code covering the whole ground, and not merely superimposing a clear obligation upon an old one. The House considered that the appellant's obligation was limited to that expressly imposed by the Act. But this was because the Act covered the same subject as had previously been covered by the common law principle; and although the obligations were not co-extensive it was considered that they were not cumulative. Dealing with the contention that the common law obligation still survived, Lord *Parker* (1) said:—"It is one thing to rely on a common law principle where a Statute is silent. It is quite another thing to invoke a common law principle in order to impose an obligation different from or in addition to the obligations which are defined by the Statute." So here, I rely on the common law principle because the Statute is silent upon the subject matter to which that principle applies. I do not invoke a common law principle in order to impose an obligation different from or in addition to obligations as to the same subject matter defined by the Statute. I invoke it in order to sustain an obligation which the Statute leaves untouched.

The manner in which the learned Chief Justice has dealt with the New South Wales cases leaves me nothing to say on that head. I am satisfied that they constitute a course of decisions which this Court ought to follow, and I superadd that as a reason why this appeal should be dismissed.

It has been truly said that this case is of great importance with regard to Commonwealth elections as well as the election in question. I quite concur in that view, but I do not propose to add to this already long judgment any disquisition on the *Commonwealth Electoral Act*. It is enough to say that I believe the principles on which this judgment rests can be invoked with regard to elections to the Federal Parliament, and that, so far as they are involved in

(1) (1915) A.C., 654, at p. 669.

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the decisions of *Chanter* v. *Blackwood* (1) and *Hirsch* v. *Phillips* (2), the very full argument that we have heard does not cause me to doubt either of those decisions. On the contrary, I think they are largely applicable to the present case.

I agree that the appeal ought to be dismissed.

ISAACS J. At an election of two aldermen of Sydney, there were four candidates. On the poll Harris received 872 votes, Bridge 843, Bowen 840 and Tyrrell 797. Harris and Bridge were accordingly returned as duly elected. There were no irregularities on the part of the returning officer, or any of his subordinates, unless the refusal to allow one person to vote was irregular. That point has not been argued, as it is conceded to be immaterial in this case. But though there has been no official irregularity, it is shown that 13 persons personated voters on the roll, of whom 12 did not themselves attempt to vote. It is not shown, and it would be difficult in any case—I do not say, impossible—to show, for whom the personators voted. They may have voted for any two of the candidates. They may, for instance, have voted for Bowen and Tyrrell, none voting for Bridge ; or they may have voted for Bridge and Bowen. However that may be, the outstanding fact is that it is not shown, either directly or indirectly, that any one of those personating votes was cast for Bridge. Nevertheless, it is contended on behalf of Bowen that Bridge should be ousted, and that the judgment of the Supreme Court ousting him was sound.

The case resolves itself into two branches. One is as to the meaning of some very plain words in the *Sydney Corporation Act* 1902, which taken in their ordinary sense are fatal to the respondent. The other branch is as to whether an unnatural meaning has been so clearly and persistently placed upon them by the Supreme Court of New South Wales and ratified by the State Parliament as to compel this Court to adopt it.

The crucial words are found in sec. 56, and are these :—" Upon the return of such rule or order, if it appears to the Court that such person so elected . . . was unduly elected . . . the Court may make such rule or order absolute." Therefore, it

(1) 1 C.L.R., 121. (2) 1 C.L.R., 132.

must "appear" to the Court that the person whose election is challenged "was"—not "may have been"—unduly elected. How on the facts before us does it appear that Bridge was unduly elected? The one circumstance that I regard as dominant in this case is this, that the election was entirely a statutory proceeding, with statutory directions and statutory consequences (*Sharpness New Docks &c. Co.* v. *Attorney-General* (1)); and there is nothing which shows the returning officer or any of his subordinates to have acted contrary to law in the whole conduct of the election. The election was officially conducted, so far as appears, in strict conformity with the law ordaining and regulating it. True, the Legislature has limited the right of voting to citizens, but, knowing there is always a danger of personation, it took certain precautions to prevent it, and having insisted on those precautions it deliberately by sec. 40 (6) made it incumbent on the returning officer to accept the votes now complained of, and by sec. 38 directed him to count them with the rest, and declared also that "the result of the election shall be thereby ascertained." If the election were to be repeated to-morrow and the same events took place, the returning officer would be bound by law to act as he did (*Pryce* v. *Belcher* (2)). As the Court said in that case under a very similar Statute in this respect (3), the Legislature has "put it in the power of parties who were not entitled to vote, to have their names put upon the poll, and thereby to influence the election." The Legislature has evidently balanced the convenience and the inconvenience of possible personation, and has chosen to take that course and insist upon an election being conducted and a candidate returned in that manner; and, if so, why is the person so returned for that reason only to be considered "unduly elected"? In my opinion, if Parliament, though specifying the true electors, also specifies its own method of ascertaining their identity for the purpose of the election, and prescribes that a person so ascertained shall not be excluded from voting, and that his vote shall be counted and the result ascertained with reference to that vote, then, even if it is in reality a personated vote, there is an end of the matter, unless further provision is made by Parliament or someone authorized by

(1) (1915) A.C., 654.
(2) 4 C.B., 866.
(3) 4 C.B., at p. 883.

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Parliament for eliminating the vote or for declaring the election void by reason of that violation of the Act. Baron *Martin's* answer to the Parliamentary Committee in 1869, conveying the views of *Willes* J., is clear and authoritative, and was endorsed in 1901 by *Kennedy* J. in the *Islington Case* (1). It is this: "To whatever extent the provisions of an Act of Parliament were wilfully violated, which did not enact that the consequences of those Acts avoided the seat, a person sitting judicially could not avoid the seat." That, of course, assumes the correct official conduct of the election, and refers to individual breaches of the law. Parliament *in this instance* has not made any provision for avoiding the seat merely because some persons unconnected with the candidate have deceived the returning officer. The course dictated by Parliament to meet possible deception has been strictly pursued, and in my judgment that alone should at once determine this matter in favour of the appellant.

The respondent, however, claimed the right to go behind the express command contained in sec. 40 (6) and took up the position that the consequence of the personator violating the truth and misleading the officer vitiated the whole election in view of the actual majority. The argument was that, as intruders had in fact forced their votes into the ballot-box in excess of the actual majority and left it necessarily unknown for whom they had voted, the result was in doubt, and then this formula was presented: "If the result *may not* represent the true choice of the majority of electors entitled to vote and voting in the manner prescribed, the person was not duly elected, and therefore was unduly elected." The contention has found favour with some of my learned brethren, and I have accordingly endeavoured to meet the position on the basis that sec. 40 (6) did not preclude inquiry.

It is obvious that in any event such an unqualified test would throw the affairs of the country into utter confusion. Throughout the centuries of representative government, which has arisen and developed under British law, no precedent can be found which rests upon a rule so universal. In one case in this Court, to which reference will be presently made, some dicta appear; but they were

(1) 5 O'M. & H., at p. 126.

unnecessary to the decision, and are not, I most respectfully observe, supported by any prior authority.

No doubt, as was said in the *North Louth Case* (1), "the common law is a living force and can apply itself to new mischiefs as they spring up." If, therefore, a Court can find a rule laid down as part of the common law, it must be applied to appropriate circumstances however novel they may be, just as if it were embodied in an Act of Parliament. But, on the other hand, it must be remembered that Judges are not legislators. As was pregnantly said by *Coltman* J. in *Parsons* v. *Gingell* (2), "it is not our province to invent rules. It is our duty to discover and to be guided by the rules that guided our predecessors." A Court not only need not fear to create a precedent in applying a rule of the common law, but is bound to do so if the facts demand it. But it must first find the rule, must not create a precedent that requires the invention of a new rule of law, and the enlargement of a rule is to that extent invention by amendment.

Now, what the party moving has according to the Statute to do is to make it appear to the Court that Bridge was unduly elected. *Primâ facie*, at all events, he was duly elected. The returning officer's declaration is presumed to be correct until shown to be wrong. There are various reasons known to the law by which it may be shown to be wrong. An election considered as an entirety may have been so vitiated by corruption of the electorate, or by undue influence (which includes intimidation) as to destroy the fundamental condition of every election, namely, that it must be free. The Statute 3 Edw. I. c. 5, in reciting that "elections ought to be free" merely recognizes the requirement of the common law, and proceeds to add the penalty of forfeiture for interference with that freedom.

It was said that the *North Durham Case* (3) supported the formula. But, as I read that case, it is very far from supporting it. *Bramwell* B. found that intimidation prevailed so extensively, as to incriminate, as he termed it, the whole constituency. That, of course, involved every candidate. The learned Judge regarded this general incrimination as *primâ facie* vitiating the election, and as casting the

(1) 6 O'M. & H., at p. 172. (2) 4 C.B., 545, at p. 560.
(3) 2 O'M. & H., 152.

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burden on the constituency of showing that in fact the result was not affected. For that purpose the majority which the sitting members got was considered important. But obviously that was not for the purpose of arithmetical calculations. No precise calculation was made of the number of persons intimidated, in order to see whether the numerical total equalled the positive majority, but a general broad calculation was made in order to judge whether the intimidation, extensive and general as it was, but nevertheless indefinite in numbers, could yet be shown by reason of the actual majority to have been not sufficiently powerful to have probably altered the final result. The case relates merely to the freedom of elections, and has no bearing whatever in the present case, except that by the fact that *Bramwell* B. looked to the probable effect, and not the possible effect (1), it is, so far as it goes, an authority adverse to the respondent's contention.

Besides the common law essential freedom, there are almost invariably added various statutory requirements in order to make an election as an entirety a proceeding conformable to law.

The case of *Woodward* v. *Sarsons* (2) deals with both classes of requirements. This case has been greatly canvassed, and appears to have led to some misunderstanding. It is of immense importance to understand it properly, because its doctrines apply to all classes of elections all over Australia. It was a case of municipal election, but that made no difference. The first question the Court formulated was (3): "What is the true statement of the rule under which an election may be avoided by the common law of Parliament?" The Court answered that question by saying an election is to be declared void by the common law, if the tribunal is satisfied as a matter of fact either (1) that there was no real *electing* at all or (2) that the election was not really conducted under the subsisting election laws. Those were the only two grounds mentioned by the Court for so avoiding the election, and they have to be considered separately in order to understand the judgment.

The Court took each ground separately. As to the first, namely, *no real election at all*, the Court said the tribunal had to be satisfied

(1) 2 O'M. & H., 152, at p. 157. (2) L.R. 10 C.P., 733.
(3) L.R. 10 C.P., at p. 743.

of a certain fact which it is essential to remember in view of the argument. I quote the words (1): "That the constituency had not in fact a fair and free opportunity of electing the candidate which the majority might prefer." Under that head the Court enumerated general corruption, general intimidation, want of machinery, fraudulent counting, false official declarations, and then added (2) "or by other such acts or mishaps." The words "such mishaps" or "such or similar mishaps" again occur, and it is only in connection with them that the words "may have been *prevented*" are found. The formulation refers to parliamentary election cases that had been decided; and it is transparent, I think, that this part of the judgment was not only under the heading "no real electing" by the constituency "at all," but is confined, by its terms, first to general disqualification of the electorate for want of a full and free opportunity to elect, and next to such an official departure from the legal requirements for the conduct of an election as to deprive the proceedings, as an entirety, of the legal character of an election. That head cannot have any relation to the present case, which is one of individual personation.

It is by overlooking the heading under which the Court's observations are made on p. 744 that the misunderstanding of the case has occurred.

The Court proceeded (2) to deal with the second head, viz., "That the election was not really conducted under the subsisting election laws at all." That has a nearer approach to the present case, but yet does not include it. Still, even as to this second head, the Court states the law in terms which appear to me to be fatal to the respondent's contention. The judgment declares that under this second head the question must be whether the departure from the prescribed *method* of election is great enough to deprive the election of its character as an election under the existing law. But there are no references to the phrase "may have been" so much relied on. On the contrary, if the "method"—by which the subsequent remarks show was meant the "ballot method"—is substantially followed, then, says the Court (3), "no mistakes or misconduct,

(1) L.R. 10 C.P., at p. 743. (2) L.R. 10 C.P., at p. 744.
(3) L.R. 10 C.P., at p. 745.

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however great, in the use of the machinery of the *Ballot Act*, could justify the tribunal in declaring the election void by the common law of Parliament." That reiterates and reaffirms the answer of *Martin* B. already quoted.

The Court next proceeds to apply those rules to the facts of the case, and in doing so indicated what they meant by the words " may have been prevented " under the first head. At p. 745 they show that it includes prevention from recording votes with effect, and say :—" There is no evidence, as it seems to us, that any elector was prevented from recording his vote, or induced not to record it, by what occurred. . . . The result is, that all the electors who desired to vote did vote." So much for actual voting. Then, at p. 746, the Court inquires into the validity or invalidity of the votes given, to see whether the voters were prevented from voting with effect by reason of the official errors. If the error was a departure, however small, from a rigid mandatory enactment, so that the vote could not be counted, there would have been a prevention as to the votes affected ; but if the departure is from a rule which requires only substantial and not strict compliance, and there is substantial compliance, there is no prevention.

They held that there was no prevention as the ballot papers were in order. In the *Islington Case* (1) *Kennedy* J. practically repeated the doctrine of *Woodward* v. *Sarsons* (2) as to breaches of the Act, and, in doing so, expressly limited the consequences stated in the rule to transgression of the law by the officials.

I have exhaustively examined the doctrine of *Woodward* v. *Sarsons* both because of the reliance placed upon it in argument and because of the dicta of the learned Chief Justice with regard to it in *Chanter* v. *Blackwood* [*No.* 2] (3).

In that case the 91 votes mentioned on pp. 129-131 of the *Commonwealth Law Reports* were regarded as invalid, but it does not appear from the report why they were invalid. It does appear, however, from the report of the same case in the *Argus Law Reports* (4) that the invalidity was not—as in this case—an invalidity challengeable only in subsequent proceedings, but was an invalidity

(1) 5 O'M. & H., 120, at p. 125.
(2) L.R. 10 C.P., 733.
(3) 1 C.L.R., 121.
(4) 10 A.L.R. (C.N.), 25, at p. 26.

which was challengeable, and ought to have been regarded by the returning officer, at the poll. The last mentioned report states :— "Counterfoils or ballot papers signed by marksmen must therefore be rejected. Seventeen votes were bad on this ground, twenty-two the applications for which were improperly attested, forty-six counterfoils attested by Justices, and six attested by stationmasters —a total of ninety-one bad votes."

The nature of the case in this respect in *Chanter* v. *Blackwood* [*No.* 2] (1) was therefore identical with that of *Woodward* v. *Sarsons* (2). No extension of the doctrine in the last mentioned case was necessary, and so far as the dicta in *Chanter* v. *Blackwood* [*No.* 2] extend the observations in the earlier case, so as to cover mere individual instances of personation, I respectfully dissent from them.

Those considerations remove the only trace of authority or precedent for throwing upon the appellant the obligation of sustaining his election, merely because individual personators exceeding two in number happened to vote.

The argument, however, suggested, rather than reasoned, the further position that the rule of the common law formulated in *Woodward* v. *Sarsons* (2) did extend or ought to be extended to personation though not general. What I have said as to not inventing law there comes into play. General personation has never been regarded at common law as avoiding an election, and *Dowse* B. in the *West Belfast Case* (3) states why. The reason is that personation is not infectious or contagious, it does not permeate ; no matter how many instances there may be, they remain separate and individual instances. At all events, there was no general personation here.

With regard to individual personation, even where there has been no such clause as 40 (6) of the *Sydney Corporation Act*, the common law, from the earliest recorded instance, has dealt with it as a matter required to be traced down in its effect to the candidate attacked.

The case of *R.* v. *Jefferson* (4) seems to me quite sufficient to dispose of the case, even if sec. 40 (6) leaves investigation open. That was a decision of the Court of Queen's Bench in an application

(1) 1 C.L.R., 121.
(2) L.R. 10 C.P., 733.
(3) 4 O'M. & H., 105, at p. 109.
(4) 5 B. & Ad., 855.

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precisely similar to the present, the voting was by ballot, there was personation in excess of the majority, but there were no means of ascertaining for whom those votes were cast. The Court was composed of three most distinguished Judges—Lord *Denman* C.J., *Parke* J. (afterwards Lord *Wensleydale*) and *Taunton* J. The decision turned upon what the common law said in such a case; and this was the judgment (1):—"No *primâ facie* case is made for this application. The officer is called upon to show title without the possibility of proving it. All the bad votes may have been for the opposing party. The rule must be discharged." *In arguendo*, *Taunton* J. said to the applicant (1): "It is for you to impugn the title."

It is impossible to distinguish this case, so far as the question turns on the common law. But for the contrary opinion held by some of my learned brothers, I should think it unnecessary to do more, even on the assumption now made, than point to that judgment to answer the onus of proof, and particularly what the Court should do where an officer is called on to show title, when there is no possibility of proving it. But respect for the opposite views entertained, and for the dicta in *Chanter* v. *Blackwood* [*No.* 2] (2), require me to investigate the matter still further.

In the *Gloucester Case* (3) *Blackburn* J., as to personation, said:—"There is very little doubt, indeed, as to what the law is upon this subject. With the *Ballot Act* and secret voting, it becomes a very dangerous offence if anyone goes to vote and contrives to get a vote registered in the name of another person when he has no right to vote, for, unless the vote of a personator is objected to, there is no machinery provided for enabling us to examine upon which side that vote was given in order to strike it off. If, however, it is once brought home, and it is shown that a particular man did not vote, but another person personated him, the vote given by that other person becomes invalid, and there is a provision for inspecting that vote and striking that vote off on a scrutiny. That makes it a very dangerous thing indeed, and therefore the Legislature have been

(1) 5 B. & Ad., at p. 858.
(2) 1 C.L.R., 121.
(3) 2 O'M. & H., 59, at p. 64.

very anxious to prevent it, and they have made a very severe penalty for it."

This passage is a valuable aid in considering the *Sydney Corporation Act* in connection with personators. Why did the learned Judge think personation "a very dangerous offence" when you could not prove that the proper voter had not voted, even though you could prove perhaps by admission that the wrong person had personated somebody? Plainly, because since you could not strike off the vote attributed to him you had to let the vote stand, and with it the election so far as that depended on the personated vote. This great danger, thought *Blackburn* J., carried with it a necessarily severe penalty, and so the *Gloucester Case* (1) follows *R.* v. *Jefferson* (2). Then, as to what the practice has been. *Hardcastle*, in his work on *Election Petitions*, 2nd ed. (1880), at p. 36, among the forms of grounds of objection relied on in a scrutiny gives as to personation: "That the voter did not actually and personally vote at the said election, but was dead, absent or otherwise incapable of voting at such election, and that he was personated by some other person who falsely assumed to vote, and *did vote in his name for the respondent.*" I italicize the last words.

That form is given after the *Ballot Act*. In England it is, and always has been, the universal practice in cases of personation to allege and prove that the personator voted for the opposite party, and thereupon the vote is deducted. Before the *Ballot Act* in England, when the voting was open, the proof was easy, because the destination of the vote was always known, and the vote was deducted from the person who got it (*Southampton Case* (3)). The same practice has been followed since the *Ballot Act* 1872, which sanctions it (*Gloucester Case* (4); *Athlone Case* (5)).

In Queensland, both in parliamentary and municipal elections, intended votes are, notwithstanding the ballot law, examined and struck off the total of the person who received them (*Queensland Parliament Papers* 1912, vol. I., pp. 40, 42, 73; *R.* v. *Martin* (6)).

(1) 2 O'M. & H., 59.
(2) 5 B. & Ad., 855.
(3) C. & K., 102.
(4) 2 O'M. & H., at p. 64.
(5) 3 O'M. & H., 57.
(6) (1907) S.R. (Qd.), 166.

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There is nothing therefore inherently contrary to the *Ballot Act* in looking to see for whom a personated vote or other intruding vote was given. The secrecy of the ballot is intended to protect those who have a right to vote, not those who illegally invade the polling booth and tend to destroy the elective privileges of the lawful voters. This principle is stated with great clearness in the *Cyclopedia of Law and Procedure* (American), vol. xv., at pp. 424, 430, 431, with cases cited.

Some Legislatures have therefore made provision for voting in such a way that until the necessity arises for eliminating invaders' votes, absolute secrecy shall be preserved; but, when such necessity does arise, means are afforded by which those votes can be ejected. So in England and Queensland. Other Legislatures appear to consider on the whole that no such means are absolutely necessary, or that their adoption may be left to the local bodies concerned. Secrecy is then inviolable whatever personation takes place. In the case of the *Sydney Corporation Act* that is the case up to the present, the Legislature having thought that so far as its own express action was concerned, it was sufficient to take the precaution of penalizing personation, if it should be detected. We have not now to determine whether sec. 200 enables a provision to be made as in rule 41 of the Schedule to the English *Ballot Act*. But I am far from being prepared to say that such a course is denied to the Council. In the meantime, what is the consequence of not affording the means of obtaining evidence as to the way the vote is cast? It is contended that that fact throws the onus upon the other side. What onus? An admittedly impossible onus. So that the argument is open to two serious objections to begin with. The first is that it assumes the Legislature preferred the upsetting an election, however honest the successful candidate, however honest his majority, if only it could be proved that enough personators or corrupt voters (for corrupt voters are also disqualified by the Act) or treated voters (equally disqualified) or a combination of them voted in fact, and this although it might be it was the unsuccessful party himself who had instigated these delinquencies. That never was the common law; and I am unable to accept it as common sense, if that were enough. The contention goes as far as this. If in an Australian

Senate election, for instance, the majority of one of the successful candidates were 10, yet if only it were proved that 3 personators voted, and 7 other persons were corrupted, by persons having influence over them, to vote, and did vote, against the successful candidates, the whole election would be bad because the onus—an impossible onus it is assumed—would be cast on the Senators returned, to show the result could not be affected. If, on the other hand, the onus is not impossible, then the person alleging the defect must on all accepted notions of law and fair play be expected to prove it. The second objection to the argument of onus resting on the party attacked is this. If the law places the onus on him now, it always did. But when the cases on personation are referred to, it is seen that the reverse is the case. And that is the constant rule of law which does not alter merely because evidence is lacking. Speaking of a case of bribery or undue influence, *Martin* B. said, in the *Bradford Case* (1), of the voter :—"He becomes a man incompetent to give a vote, because he has not that freedom of will and of mind which the law contemplates he ought to have for the purpose of voting. But that affects the man alone, it *does not affect the candidate*; it has merely the effect of *extinguishing the vote*, and if there was a scrutiny for the purpose of ascertaining who had the majority of lawful votes, that man's vote ought to be struck off the poll, but *that is all*."

I condense the result into the following relevant propositions :—

(1) The election of an officer—in other words, his selection by the constituency—may be attacked only for a defect which affects him.

(2) If the defect strikes at the entire election, either because there was no real election at all or because some official irregularity has occurred, he is affected because his title is claimed through it, and he must meet the defect if he can.

(3) If there has been no real election, his selection so-called is necessarily void.

(4) If there has been any official irregularity in the conduct of the election, where the law requires absolute and strict

(1) 1 O'M. & H., 35, at p. 40.

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adherence or where the irregularity is so great as to depart substantially from a directory enactment, his selection so-called is void unless he can show the result could not have been affected by it.

(5) Where the defect complained of does not strike at the election as an entirety, but is confined to some breach of law in individual instances, then he is not necessarily affected, and is not affected at all unless he or his majority is shown to be connected with the defect.

(6) If the law does not provide any means of so affecting him he is not affected, and, as his selection cannot be regarded as unduly made, it must rest where it is.

On a true construction, then, of sec. 56 uncontrolled by legislative adoption of four decisions in New South Wales, the respondent did not make it appear that the appellant " was unduly elected."

On the second branch of the case, the respondent contends that by various decisions the Supreme Court of New South Wales prior to 1902 held the words " was unduly elected " to have the meaning contained in the respondent's formula ; and that the Act of 1902 must be taken to be a legislative adoption of that meaning. The cases are *Ex parte Dalton* in 1872 (1), *Ex parte Moore* in 1887 (2), *Ex parte Gale* in 1891 (3), and *Ex parte Ogden* in 1893 (4). These cases do not support the position. The appropriate test of legislative adoption of a judicial decision by these consolidating Acts is stated in *Williams* v. *Dunn's Assignee* (5). They were either cases under the *Municipalities Act* 1867, which does not contain any provision similar to sec. 40 (6) of the *Sydney Corporation Act* 1902, or cases where official irregularities were expressly or impliedly assumed, and the last mentioned case, in addition, was a decision that there was nothing wrong with the election. The Legislature, therefore, in 1902 had before it no decision placing on the words " unduly elected " the unnatural meaning contended for, and, therefore, we are bound to construe them accurately, whatever that construction may be.

(1) Brown. Municip. Act of 1867, App., 171.
(2) 8 N.S.W.L.R., 108.
(3) 7 W.N. (N.S.W.), 1, 93.
(4) 14 N.S.W.L.R., 86.
(5) 6 C.L.R., 425.

That construction I have already dealt with, and, in the result, my opinion is that the appeal should be allowed, and the order *nisi* to oust discharged.

HIGGINS J. The question is, has Mr. Bowen proved that Mr. Bridge was "unduly elected," within sec. 56 of the *Sydney Corporation Act* 1902? The facts are simple. Bridge got 843 votes; Bowen got 840; 13 of the votes were the votes of personators; and the Act provides no means of finding for whom these votes were cast. For aught we know, all of the 13 votes were cast for Bowen, and the honest votes then would be: Bridge 843, Bowen 827. If we are not coerced by authority the answer to the question seems to me to be easy—Bowen has not shown that Bridge was "unduly elected," and must fail on this application. It may be hard on Bowen that he has no means—for the Act provides no means—of showing for whom the 13 votes were cast; but the hardship applies equally to Bridge. Bridge is the man in possession; he has the majority on the returning officer's count under sec. 38; he has been declared elected; has Bowen shown a right to turn him out? Mr. *Knox* argues that when you cannot predicate of a man that he is duly elected, he is unduly elected. This means that if the candidate who has been returned on the count of votes cannot establish the fact that he was duly elected, he is "unduly elected." But such an argument involves an inversion of the burden of proof, as was pointed out in *R.* v. *Jefferson* (1).

Apart from the burden of proof, what is the meaning of "unduly elected" in this Act—the *Sydney Corporation Act* 1902? The mere fact that a single personating vote was cast does not make a candidate "unduly elected." If he has 50 majority, and one personating vote has been cast for some candidate, unascertained, there has been undue or improper conduct of some unknown person; but the undue conduct of this person does not establish that the candidate with the majority was "unduly elected." If in the case put—of a candidate with 50 majority—it be proved that 60 of the names on the roll ought not to have been on the roll, ought not to have been allowed by the Revision Court, still the candidate has not,

(1) 5 B. & Ad., 855.

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in my opinion, been unduly elected; for the roll as revised is conclusive as to the persons who may vote. Sec. 21 says:—"There shall be two aldermen for each ward, who shall be elected *by the persons on the roll* for such ward." This section was first inserted in the Sydney Corporation Acts, before consolidation, in 1900 (Act No. 30, sec. 19). I think it clear also—on a direct, unsophisticated interpretation of the Act, and still assuming that we are not coerced by authority—that in the same case, if it be proved after the election that there were 60 personated votes, the candidate has not been "unduly elected." For by sec. 40 (6) it is provided that *no person is to be excluded from voting* "unless it *appears to the presiding officer* that the person claiming to vote is not the person whose name appears on the roll, or that he has previously voted at the same election within the same ward, or otherwise contrary to this Act." That is to say, unless the presiding officer detect the personation at the time of the election, the vote is to be allowed. The ballot boxes are locked before the election (sec. 32), the ballot papers are put in (sec. 34); at the close of the poll the boxes are sealed up so as to prevent any ballot papers from being taken therefrom, and are taken to the returning officer (sec. 37). Then "the whole of the ballot papers shall be examined and the votes counted by the returning officer &c., and *the result of the election shall be thereby ascertained*"; and the mayor, on receiving the report of the returning officer, declares the names of the aldermen elected (sec. 38). As Lord *Denman* said, in *R.* v. *Jefferson* (1): "The bad votes may be sifted off as the voters come into the room; but when they have been admitted to ballot, how can any scrutiny take place?" The candidate who has the actual majority of votes on the count has not been "unduly elected"; the fact that there are some votes of personators whom the presiding officer did not detect, votes which cannot be traced, does not make him "unduly elected." The Legislature seems to have come to the conclusion that both as to persons entitled to vote, and as to the persons entitled to be aldermen, it is useless to hope for an ideal ascertainment of the wishes of the electors who vote, and that finality as to the result is, on the whole, better for the city. As checks to personation, the Legislature seems

(1) 5 B. & Ad., 855, at p. 857.

to have relied on the provisions of secs. 40 and 48. Secs. 40 requires each voter to sign a declaration that he is the person named in the roll, and a false statement is a misdemeanour; and it enables the presiding officer to ask the question "Are you the person named, &c." in the roll? and a false answer is also a misdemeanour. The penalties of the crime are strong enough, if the guilty person be detected; but whether the penalties are, in the circumstances, effective as against personators when the ballot papers cannot be identified with the voters, it is for the Legislature, not for us, to determine.

But it is urged that there has been a long series of cases decided in the Supreme Court of New South Wales, before the consolidating Act of 1902, which established the principle that if there be shown to be wrong votes sufficient in number to affect the result of the election, the candidate who has the majority of votes on the actual count is *primâ facie* "unduly elected," and that the burden of proof then lies on that candidate to show that the wrong votes (or a sufficient number to convert his majority into a minority) were not cast for him. Where are the cases which establish this principle? I cannot find any such cases, decided under the Sydney Corporation Acts. The doctrine is clear, as laid down in *Ex parte Campbell* (1) and many other cases, that if certain words have been solemnly and definitely held by Courts, in a case which turned on the meaning, to have a certain meaning, and if the Legislature afterwards uses the same words without change in an amending Act, or even in a consolidating and amending Act, it is to be presumed that they were re-enacted with the meaning which the Courts had placed upon them (*Mackay* v. *Davies* (2)). The presumption is not so strong—if it applies at all—in the case of a mere consolidating Act, such as the *Sydney Corporation Act* 1902, with which we have to deal (*Saunders* v. *Borthistle* (3)). But where are the cases? The case of *Ex parte Moore* (4) was decided under the *Sydney Corporation Act* of 1879, which, with amendments, was consolidated in the present Act of 1902. In that case the presiding officer wrongly allowed votes for 15 firms which were wrongly on the roll—wrongly, because they were

(1) L.R. 5 Ch., 703, at p. 706.
(2) 1 C.L.R., 483.
(3) 1 C.L.R., 379, at p. 383.
(4) 8 N.S.W.L.R., 108.

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not "persons" having a Christian and surname; and to justify the presiding officer in allowing a vote, it had to be tendered by a citizen, a person whose name was on the roll (sec. 12), and it was the duty of the officer to ignore the names of firms that appeared on the roll. The presiding officer, therefore, did not carry out duly the machinery prescribed by the Act for election, the election was not duly held, there was a "defect in the election" (sec. 57 of the Act of 1902). As *Darley* C.J. said (1), it was quite possible that the majority of the electors "*by means of the irregularities in the mode of conducting the election* have been prevented from electing the candidate of their choice." The case turned on the fact, not that there was personation or other misconduct by individuals, but that there was no proper election, the proper machinery was not applied; and, on the evidence, it could not be established that the mishap did not affect the result. It will be observed that the consideration whether the mishap affects the result or not is applied, not to relieve the applicant of his burden of proof under sec. 56 (sec. 50 of the Act of 1879), but to relieve the respondent in possession of the seat of the consequences of an admitted official irregularity in the conduct of the election. In the present case there was no official irregularity whatever. The election and the count and the return were in accordance with the Act; there was a due *election*, and Bridge was not "unduly elected."

There are cases under the *Municipalities Act* 1867 which tend, more or less, in the direction of the principle asserted on behalf of Bowen; but the *Municipalities Act* is not the *Sydney Corporation Act*, it differs from the latter Act in several respects; and in particular the former Act, and the subsequent Act of 1897, had not the provision which is found in the present *Sydney Corporation Act* (1902, sec. 40 (6)) as well as in the *Sydney Corporation Act* of 1879, to the effect that *no one is to be excluded from voting unless it appears to the presiding officer* that he is not the person whose name appears on the roll. These cases under the *Municipalities Act* have been already fully discussed in the judgment of *Isaacs* J. It is not necessary to consider whether we should be able to concur with all the decisions and all the reasoning; it is enough that they do not apply to the Sydney

(1) 8 N.S.W.L.R., at p. 115.

corporation, and do not bring this case within the principle of *Campbell's Case* (1).

To sum up the position, our "first step . . . should be to interpret the language of the Statute" under which this application is made; and if the language is clear it must prevail over any preconceptions as to the law of elections which we have derived from cases under other Acts. The words quoted are those of Lord *Herschell* in *Bank of England* v. *Vagliano* (2). It was a case of a codifying Act, not a consolidating Act; but (subject to the principle of *Campbell's Case* (1)) his words are applicable to this case:—"The proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view" (3).

GAVAN DUFFY and RICH JJ. We have read the judgment of our brother *Isaacs* and agree with it.

POWERS J. This is an appeal from the judgment or order of the Supreme Court of New South Wales, made on 7th April 1916, ousting the appellant Clarence Walter Bridge from the office of alderman of the City of Sydney, to which he has been declared duly elected under the provisions of the *Sydney Corporation Act* 1902, upon the ground "that the said Clarence Walter Bridge was not duly elected as an alderman within the provisions of the *Sydney Corporation Act* 1902." The order was made under sec. 56 of the *Sydney Corporation Act* 1902, sub-sec. 2, which has already been quoted by my learned brothers. The appeal against the judgment is made on the ground that "the Supreme Court was in error in deciding that the appellant was unduly elected." On this appeal the sole question to be decided, therefore, is whether it appears to this Court, on the evidence submitted, that the appellant, Clarence Walter Bridge, was "unduly

(1) L.R. 5 Ch., 703.

(2) (1891) A.C., 107, at p. 145.

(3) (1891) A.C., at p. 144.

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elected " within the meaning of sec. 56 of the Act of 1902. The facts on which this Court has to decide the question have already been fully referred to in the judgments just delivered. If the Supreme Court were right, it must appear that a person is " unduly elected " (within the meaning of the section) if a number of persons (possibly two) personate voters and the number is sufficient to turn the scale—even if the personators may have voted against the candidate declared as duly elected, and for the candidate not elected.

The *Sydney Corporation Act* 1902 makes full provision for the mode of election, provides penalties for personation, second voting, bribery and intimidation, and allows candidates to have scrutineers to prevent, as far as possible, personation at elections. The Act also declares grounds upon which elections are void, but does not include personation as a ground. Second voting and personation are treated as misdemeanours. It is clear that personation in itself does not, *by the Act*, cause a person to be " unduly elected." The question is whether, if the personated votes could have turned the scale, the person elected, although it cannot be proved that he received any of the personated votes, was duly elected within the meaning of the Act. It is admitted that the appellant was not declared to be unduly elected because of any disqualification, or for any breach by him of any provisions of the Act, or through any fault of any of the officers conducting the election. We must therefore look to the common law and decisions declaring that law, to see if the respondent was, under the circumstances mentioned, unduly elected.

The returning officer properly received and counted the personated votes, because he had no power to refuse votes unless it appeared to him " that the person claiming to vote is not the person whose name appears on the roll, or that he has previously voted at the same election within the same ward, or otherwise contrary to the Act " (sec. 40 (6)). If a new election were ordered the same number of personators could vote, and their votes would have to be counted. The case of *Woodward* v. *Sarsons* (1), so strongly relied upon by the respondent, does not, in my opinion, apply in this case. Personation is not one of the mishaps referred to in the judgment in that case.

(1) L.R. 10 C.P., 733.

It was, however, contended that if bribery or intimidation is so widespread in a constituency that the constituency has been deprived of its right to express an opinion, an election should be set aside. That is true. An election is also set aside if, by any fault of the officials conducting it—want of polling booths, want of ballot papers, &c.,—the constituency is not allowed to express an opinion, and it is impossible to say what number of votes were excluded by the mishaps or faults referred to. It was contended that personation also could be so widespread that it would have the same effect on a constituency as widespread bribery or intimidation. The *West Belfast Case* (1) was quoted against such a contention. On the other hand, it was contended, and rightly, I think, that the personation was not widespread in this case—13 voters out of 1,683—and that elections had never been set aside for personation unless the illegal votes were given to the person elected and the votes wrongly given in favour of the person elected were sufficient to turn the election.

Counsel for the respondent in this case had to admit that if his contention were correct two personators in a federal election for the House of Representatives, where the number of voters averages 30,000, would be sufficient to cause a person to be declared to be unduly elected if there were only one vote between the candidates, even if it could not be proved that the successful candidate received any personator's vote. Two personators in a Senate election for the State of New South Wales—where the number of voters in April 1916 was 1,030,361—would have the same effect if one vote only divided the last of the successful six candidates and the first of the unsuccessful candidates. In the cases referred to, the successful candidate would be declared unduly elected, although elected in accordance with the Act, even if the two personators had in fact voted for the defeated candidate. Two personators voting on a measure submitted to the people of Australia by a referendum, on which 2,716,871 voters were entitled in April last to vote, would have the same effect if the majority of votes for or against the measure submitted were only one. If the proper interpretation of the Act requires the Court to give to it such an effect it must be

(1) 4 O'M. & H., 105.

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done, but, reading the Act as a whole, I hold that Parliament did not intend anything of the sort, but contented itself with doing its best to prevent personation, by making personation a misdemeanour, by allowing the presiding officer to reject personators' votes if he is satisfied they are personators, and by allowing scrutineers to act for the candidates at elections.

The impossibility of proving for whom the personator voted in some of the States of Australia, and under this Act, is caused by the desire of Parliament to secure absolute secrecy of the ballot—although in England and in Queensland provision is usually made to enable a Court, and a Court only, to see for whom votes are recorded if it is necessary in the public interests to do so. Although the Parliament of New South Wales has preferred, in order to secure the secrecy of the ballot, to make it impossible to ascertain *from the ballot papers* how a personator, or a person who has been bribed, or a person who has been intimidated, has actually voted, I cannot think that Parliament meant by sec. 56 to say that a person must be deemed to have been unduly elected although elected by good votes, or when it is quite probable that some persons favouring the defeated candidate stole some of the votes of supporters of the elected candidate by personation, thereby reducing his majority.

I find myself compelled to hold that Parliament intended that a qualified person, elected in accordance with the Act, would be duly elected, even if some few persons were guilty of the crime of personation, unless it is proved in some way that illegal votes sufficient to turn the election were given in his favour. I find that view was taken by the Court of King's Bench consisting of *Denman* C.J. and *Parke* and *Taunton* JJ. in the case of *R.* v. *Jefferson* (1). In that case it appeared: (1) that about 600 out of 1,000 persons voted at an election who were not entitled to vote; (2) that a candidate would have had to receive 801 votes to enable him to prove beyond question that he was elected by a majority of the good votes—namely, 600 bad votes and 201 good votes; (3) that no candidate received 801 votes; (4) that the 600 votes were recognized as bad votes; (5) that it was impossible to discover how any person voted at the election in question; (6) that the person elected

(1) 5 B. & Ad., 855.

may have received a majority of good votes, and it was not proved that he had not done so. On these facts the Court held (1):—"No *primâ facie* case is made for this application. The officer is called upon to show title without the possibility of proving it. All the bad votes may have been for the opposing party. The rule must be discharged."

Reference was made to the decisions of this Court in three cases:—*Chanter* v. *Blackwood* [*No.* 2] (2); *Hirsch* v. *Phillips* (3); and *Blundell* v. *Vardon* (4). I think the cases were rightly decided, but those decisions were based on errors or omissions made by the returning officer in allowing or disallowing votes, and therefore do not, in my opinion, apply.

It is strongly urged that such an interpretation of the section will give to a personator's fraudulent vote the value given to a lawful vote. That is not so, because the personator's vote, if proved to be in favour of any candidate, would be disallowed in the same way that a vote proved to have been obtained by bribery would be disallowed. Because Parliament does not provide a simple method of ascertaining for whom personators vote, I cannot assume that it intended to make the election of a candidate who honestly conducted an election, and who secured a majority of legal votes in a properly conducted election, illegal.

It is also urged that such a decision will give an impetus to personation. Personally, I do not think the effect of a law we are called upon to interpret should influence our interpretation of it, but, if so, I think the decision that an election will be declared to be undue if personators vote at it would give a greater impetus to personation in all contests likely to be closely contested, than the decision I feel called upon to give, because, if personation by a few persons can cause an honest candidate to be declared unduly elected, it will only be necessary for the unscrupulous friends of a candidate to obtain personators, and if they find the stolen votes are not sufficient to elect their candidate they will be enabled, by proving the personation they arranged for, to have the election of the successful and honest candidate (who lost votes by their fraud)

(1) 5 B. & Ad., 855, at p. 858.
(2) 1 C.L.R., 121.
(3) 1 C.L.R., 132.
(4) 4 C.L.R., 1463.

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to be declared unduly elected, and obtain an order for a new election. The Supreme Court recognized that its decision was likely to give an impetus to personation, but left it to Parliament to apply a remedy. Whichever view is the correct one, I agree that it is for Parliament to provide the remedy by making it more difficult to personate, by making the detection of the crime possible, by making it possible to ascertain for whom personators vote, or by making the punishment for personation more severe; or, if it thinks fit, by enacting that if there is personation, such as there was in this case, an elected representative, whether guilty or not guilty of personation, and even if his opponent in fact obtained all the personated votes, is to be declared unduly elected. I cannot imagine any Parliament intentionally passing such a law.

Another ground was relied on by the respondent, namely, that the Act in question was passed after a series of decisions in the Supreme Court of New South Wales, in which the Court held that persons were unduly elected if persons not entitled to vote voted at an election in sufficient numbers to make it possible to turn the election; and that this Court ought therefore to follow the decisions of the Supreme Court given before the Act was passed. The first answer to that is, in my opinion, that the decisions in the cases referred to were based, rightly or wrongly, on the fact that the votes were wrongly received by the presiding officer or that there was some mishap in carrying out the election. In this case it is admitted the returning officer rightly received and counted the votes, and the election was properly conducted. The second answer is that the Act in question is merely a consolidated Act, and the rule to be observed by Courts where an amending Act has been passed after a judicial interpretation has been given by decisions of superior Courts to any words used in any section of the Principal Act, without amending the section, does not apply. In *Williams* v. *Dunn's Assignee* (1) this Court unanimously held that the rule did not apply when it did not appear that the Legislature intended to apply their minds to the subject in question, as in the case then being considered, where the Act was a mere consolidation of existing statutory provisions. That decision has

(1) 6 C.L.R., 425.

not been questioned in this Court or in any of the superior Courts in England so far as I am aware.

I hold, on the evidence submitted in this case, that Clarence Walter Bridge was not unduly elected within the meaning of sec. 56 of the *Sydney Corporation Act* 1902.

I agree that the appeal should be allowed.

GRIFFITH C.J. As a majority of the Bench are of a different opinion from that taken by my brother *Barton* and myself, the appeal will be allowed. But I think it my duty to invite public attention to the state of the law as now laid down. It is this: In elections conducted by ballot when there is no means of identifying the votes given by individual voters, a vote given by a successful personator is, at common law, unless otherwise expressly declared by Statute, as effective as a vote given by a genuine elector. It follows that when it is shown that personators sufficient in number to turn the scale have succeeded in voting the election is, nevertheless, valid, and cannot be set aside.

This decision governs elections to the Federal Parliament and to most of the State Parliaments, as well as municipal elections. But, although I am bound to accept it as correctly declaring the law until it is overruled or the law is altered by Statute, I cannot believe that it expresses the deliberate will of the Parliament or the people of the Commonwealth.

Appeal allowed. Order absolute discharged with costs. Respondent to pay costs of appeal.

Solicitors for the appellant, *McElhone & Barnes.*
Solicitor for the respondent, *J. B. Frawley.*

B. L.